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No. 91-_____

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1991

VINOD C. BHAN, CRNA,

*Petitioner,*

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.
AND JOHN E. MENAUGH,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Is an agreement to boycott a lower-cost class of health care professionals at the behest of their higher-cost physician competitors and to protect the physicians' incomes illegal *per se* under the *Klor's* doctrine as recently reaffirmed in *Summit Health v. Pinhas*?

2. Can concerted action to eliminate a lower-cost class of competing health care professionals be justified by the possibility that it may improve a hospital's quality of care or patient draw? If so, does the Seventh Circuit's decision in *Wilk II* describe the elements of that affirmative defense?

## LIST OF PARTIES

The parties to the proceedings below were: (1) the petitioner, Vinod C. Bhan, CRNA (plaintiff and appellant below); (2) respondents, defendants and appellees below NME Hospitals, Inc., National Medical Enterprises, Inc. and John E. Menaugh (collectively the "NME Defendants"); and (3) former defendants Yong Suk, MD, and California Society of Anesthesiologists and California League of Anesthesiologists, California corporations. The former defendants were not parties to the appeal (Ninth Circuit Docket No. 87-2727), from which this petition arises.

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v.

NME HOSPITALS, INC.,
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AND JOHN E. MENAUGH,

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding entered March 25, 1991.

## OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reported at 929 F.2d 1404 (9th Cir. 1991). That opinion affirmed the judgment entered by the United States District Court for the Eastern District

of California pursuant to its opinion reported at 669 F. Supp. 998 (E.D. Cal. 1987).

Included in the Appendix in addition to the above-cited opinions are the Ninth Circuit's prior opinion in this action, reported at 772 F.2d 1467 (9th Cir. 1985), and the District Court's ruling which the Ninth Circuit there reversed, reported at 1985-1 Trade Cas. (CCH) ¶ 66,500 (E.D. Cal. 1984).

## STATEMENT OF JURISDICTION

On March 28, 1983, petitioner filed his Complaint in the United States District Court for the Eastern District of California seeking damages and injunctive relief under 15 U.S.C. §§ 15, 26 for alleged violations of 15 U.S.C. §§ 1 and 2 and pendant California law torts. The District Court had jurisdiction pursuant to 28 U.S.C. § 22 and the principles of pendant jurisdiction.

After the Ninth Circuit reversed a previous dismissal, the District Court granted summary judgment in favor of Respondents on September 16, 1987. Petitioner timely appealed.

On March 25, 1991, the Ninth Circuit issued its opinion affirming the District Court. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on April 8, 1991, which the Ninth Circuit denied by Order filed July 2, 1991.

The Supreme Court has jurisdiction to review the judgment of the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

*15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

## STATEMENT OF THE CASE

This case arose from a conspiracy to exclude "a class of nonphysician anesthesia providers from a hospital." *Bhan v. NME Hospitals*, 929 F.2d 1404, 1407 (9th Cir. 1991) ("*Bhan II*"). In a prior appeal from a dismissal on the pleadings, the Ninth Circuit recognized that the excluded class, Certified Registered Nurse Anesthetists ("CRNAs"), compete with MD anesthesiologists ("MDAs") in California. *Bhan v. NME Hospitals*, 772 F.2d 1467 (9th Cir. 1985) ("*Bhan I*"); *see also*, *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1443, 1444 (9th Cir. 1988)[1] CRNAs' lower fees

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[1] Anesthesia, a recognized nursing practice before physicians took it up, has a long history of competitive tension in this country. See generally, I. P. Gunn, *Nurse Anesthetist-Anesthesiologist Relationships: Past, Present, and Implications for the Future*, 43 AANA JOURNAL 129 (April, 1975), copy attached to C.R. 29 (opposition to original Rule 12 motion).

have contributed to competitive tensions.[2] Indeed this is not the only case in the Ninth Circuit in which MDAs through a boycott conspiracy replaced an independent, fee-for-service CRNA to eliminate CRNA competition. *Oltz*, 861 F.2d at 1443 (noting fee disparity between CRNA plaintiff and MDA competitors). No patient care quality difference between CRNA and MDA care has ever been shown.

As both lower courts observed, Mr. Bhan presented sufficient conspiracy evidence to avoid summary judgment on that ground. *Bhan v. NME Hospitals*, 669 F.Supp. 998, 1017 (E.D.Cal. 1987); *Bhan II*, 929 F.2d at 1410. Briefly, that conspiracy evolved as follows:

Beginning in 1979, Vinod Bhan, a highly respected[3] CRNA, practiced on an independent fee-for-service basis at Respondents' hospital, then the only acute care hospital in the small California central valley town of Manteca. During his three-and-a-half year tenure at Manteca Hospital, Mr. Bhan provided about

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[2] *Bhan II*, 929 F.2d at 1407 (MDAs charge more than CRNAs). As illustrated in the American Association of Nurse Anesthetists' 1986 Membership Survey Results, copy attached to C.R. 258, Income Supplement page 4 (Table 2), CRNAs who practice free-lance or in all-CRNA groups have the highest average incomes; by contrast, those who practice in groups with MDAs have the lowest.

[3] Even Mr. Bhan's adversaries in this action acknowledged that Mr. Bhan's work was of high quality and his relations with physicians and hospital staff were consistently good. Ninth Circuit Excerpt of Record (two consecutively paginated bound volumes, cited herein, as in that court, as "Ex.") 014-025, 307:8-11, 308:7-15, 312:21-25; district court Clerk's Record (C.R.) 249 [Menaugh depo. Vol. II] at 136:13-17; C.R. 241 [depo. of Chief of Surgery Stoops] at 57:2-4; C.R. 240 [depo. of MDA defendant Suk] at 122:9-14; and see C.R. 7 (concession by defense counsel).

half of the anesthesia coverage, while a succession of MDAs provided the rest. Partly in response to dissatisfaction with Michael Cull, MD, the MDA then on staff, and the history of MDA turnover, Hospital administrator John Menaugh sought to replace Dr. Cull with a new MDA, Dr. Yong Suk. Dr. Cull then hired the lawyer for the California Society of Anesthesiologists, who threatened to sue the hospital if it reduced or cut off Dr. Cull's clinical privileges (929 F.2d at 1408) and reportedly suggested that the hospital would be better off with an all-MD anesthesia policy.

After this threat and various other discussions among the two MDAs, administrator Menaugh and certain surgeons, the hospital's Surgery Committee met with Menaugh to discuss the three anesthesia providers. Believing that the volume of anesthesia cases would not "support" three providers,[4] the surgeons and Menaugh agreed to urge the hospital's board to adopt the MD-only anesthesia policy. To ensure that the MDAs would

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[4] *Bhan II*, 929 F.2d at 1408 ("AAS ... felt that the volume of work at the hospital could not support three anesthesia providers."). The impetus to restrain competition was also part of the surgeons' discussion. Even though no surgeon came forward (see *Bhan v. NME Hospitals*, 669 F. Supp. at 1009, text accompanying n. 4 [Ex. 428:16-18]), administrator Menaugh, who attended the key Surgery Committee meeting, testified that: (1) the Committee focussed on the economics of anesthesia until Menaugh told the doctors to couch their decision in "quality of care" terms, CR 249 at 244:24-246:1; (2) a participant predicted that the surgeons would not use Dr. Cull if Mr. Bhan and Dr. Suk were also available, CR 249 at 246:15-22; and (3) Mr. Menaugh himself told the Surgery Committee that he felt having three anesthesia providers would cause "virtual chaos," CR 249 at 268:23-269:11.

earn adequate incomes[5] -- working, as they did, at only the one hospital -- Mr. Menaugh then insisted that the two MDAs divide the work equally.[6]

No clinical analysis, medical journal review or market survey suggested that the exclusion of CRNAs would enhance the hospital's ability to attract, or care for, patients. Based entirely on its own speculation that the anesthesia restraint "may" enhance competition in the hospital-patient market, the Ninth Circuit held that a conspiracy to boycott a class of competitors requires full-blown Rule of Reason analysis.

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[5] Direct evidence of anticompetitive purpose includes administrator Menaugh's admission that one of the Surgery Committee members predicted that the surgeons would choose not to use Dr. Cull if both Dr. Suk and Mr. Bhan were available. C.R. 249 at 246:15-22. *But cf.* 669 F. Supp. at 1009 n. 4 and accompanying text [Ex. 428:16-18].

[6] *Bhan II*, 929 F.2d at 1408. When Dr. Cull resisted Mr. Menaugh's proposal that the two MDAs split the anesthesia equally (Ex. 248, and see *Bhan v. NME Hospitals*, 669 F.Supp. at 1010), Dr. Suk said he would let the surgeons choose their anesthetists (CR 240 at 131:19-133:5). In response to Dr. Suk's threat, Dr. Cull acceded to the 50-50 split (CR 233 at 85:20-87:22, CR 234 at 132-139.

## REASONS FOR GRANTING THE WRIT

In this case the Ninth Circuit impermissibly restricted settled law on group boycotts and reached out beyond both the affected market and the record to find a hypothetical benefit to competition in a different market. In so doing the Ninth Circuit placed itself in conflict with the Third and Seventh Circuits, the recognized need to prevent doctors from suppressing competition by denying hospital access to lower cost allied health professionals, and the teachings of *FTC v. Indiana Federation of Dentists*. Resolving these conflicts with the other United States courts of appeals, and with applicable decisions of this Court, will help to assure competitive health care markets.

### I. THE CIRCUIT COURT'S OPINION CONFLICTS WITH SETTLED BOYCOTT LAW BY IGNORING THIS COURT'S RULING IN *KLOR'S*.

In discussing whether the facts of this case make out a *per se* unlawful group boycott, the court of appeals' decision conspicuously omits this Court's most directly applicable precedent, *Klor's Broadway Hale Stores*, 359 U.S. 207 (1959). *Bhan II*, 929 F.2d at 1411-1412. After the Ninth Circuit ruled, this Court reaffirmed the "group boycott" rationale of *Klor's* in *Summit Health, Ltd. v. Pinhas*, 500 U.S.__, 111 S.Ct. 1842, 114 L.Ed.2d 366, 376-377, 59 U.S.L.W. 4493, 4496 (May 28, 1991).

In addressing interstate commerce jurisdiction under the Sherman Act, the Court in *Pinhas* reiterated the principle that underlies the rule of *per se* illegality established by *Klor's*: a conspiracy which misuses a "gateway that controls access to the market for

[plaintiff's] services" renders the restraint "more significant than the fate of 'just one merchant whose business is so small that his destruction makes little difference to the economy.'" 500 U.S. __, 114 L.Ed.2d at 376, 59 U.S.L.W. at 4496 (quoting from *Klor's*, 359 U.S. at 213). Denial of clinical privileges for CRNAs in acute care hospitals is essentially the same "gateway" as the denial of physician hospital privileges involved in *Pinhas*.

The Ninth Circuit's boycott analysis is in conflict with *Klor's*. *Bhan II*, 929 F.2d at 1411 (citing three other boycott cases from this Court).[7] Mere speculation that restraining competition among anesthesia providers "may" enhance competition among hospitals (929 F.2d at 1412) is no grounds for refusing to apply the *per se* rule. *Pinhas* alone justifies reversal for, as shown below, the group boycott shown in this case is even more suitable for *per se* treatment than that shown in *Klor's*.

In *Klor's*, the defendant retail department store chain pressured various manufacturers and distributors of consumer appliances to stop selling to Klor's. This Court held that the risk that such boycotts could be used to drive small retailers from the market justified applying the *per se* rule.[8] Notably, although the

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[7] The opinion also fails to address two recent Ninth Circuit precedents describing the two types of group boycotts which the courts have recognized as unlawful *per se*. *Charley's Taxi Radio Dispatch v. SIDA of Hawaii*, 810 F.2d 869, 877 (9th Cir. 1987); *Movie 1 & 2 v. United Artists Communications*, 909 F.2d 1245, 1253 (9th Cir. 1990) *cert denied*, 111 S.Ct. 2852.

[8] *Klor's*, 359 U.S. at 210. "Monopoly can as surely thrive by the elimination of such small businessmen, one at a time as it can by driving them out in large groups." *Id.*, at 213. Contrast *Bhan II*, 929 F.2d at

"group" which boycotted Klor's was horizontally arrayed -- a group of suppliers of the consumer products which the opposing parties' stores sold -- the Court did not concern itself with evidence of collusion among them. *Cf. Business Electronics Co. v. Sharp Electronics*, 485 U.S. 717, 734 (1988) (horizontal relationships, not so-called horizontal "effects," prerequisite to *per se* analysis). Implicitly a "hub and spoke" conspiracy, i.e., agreements between the defendant and each of the suppliers, sufficed to make the *per se* rule applicable.

Replacing the *sellers* of goods in *Klor's* with the *buyers* of services in *Bhan*[9] reveals that *Bhan* represents a boycott both within the *per se* rule of *Klor's* and, in two respects, more self-evidently harmful to competition. Moreover, unlike the weakly-defined conspiracy of *Klor's*, in this case both the district court and the court of appeals examined Mr. Bhan's evidence of conspiracy and found it sufficient for a jury to find defendants liable. *Bhan II*, 929 F.2d at 1410, 1413 n. 11.

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1413 ("The only actual effect shown is that one nurse anesthetist no longer works at one hospital").

[9] Indeed, the Ninth Circuit, rejecting Broadway-Hale's narrow construction, observed that the Sherman Act "includes protection against the anti-competitive conduct of *buyers*" as well as sellers or competitors. *Klor's, Inc. v. Broadway-Hale Stores*, 255 F.2d 214, 233 (9th Cir. 1958), *rev'd on other grounds*, 359 U.S. 207.

*Klor's* applies because in this case, the buyers -- the surgeons *and* the hospital[10] -- operated at the same level, sharing the responsibility to make anesthesia services available for surgical patients. However, unlike *Klor's*, this case involves an actual, documented agreement among those buyers, under economic and legal pressure from Mr. Bhan's MD competitors, to eliminate Mr. Bhan and CRNA competition. Further, the restraint against non-MDs resulted from a "combination" or implied agreement between two types of MDs, surgeons and MDAs.

More importantly, as the Ninth Circuit observed, this was a boycott of an *entire class* of competitors. The demonstrated anticompetitive effect therefore goes beyond that which concerned the Court in *Klor's*, and the *potential* for harm is at least as great. *See Pinhas*, 59 U.S.L.W. 4493, 4496.

Like the defendants' summary judgment showing

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[10] See *United States v. American Society of Anesthesiologists*, 473 F.Supp. 147, 160 (S.D.N.Y. 1979) ("There is unrefuted evidence that the patient is not truly a customer of the anesthesiologist."); *Weiss v. York Hospital*, 745 F.2d 786, 826 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) (patient makes only one "purchase decision -- where to be hospitalized."); and *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286, 291 (5th Cir. 1982) (*rev'd on other grounds*, 466 U.S. 2 (1984) (anesthesia provider is normally selected by the surgeon). See also note 5, *supra*, re a Manteca surgeon's prediction that the surgeons would have chosen Mr. Bhan over Dr. Cull if all three anesthesia competitors were available at the hospital.

Apart from its role in selecting (approving the credentials of) anesthesia providers, the hospital was also a purchaser of anesthesia services in an economic sense. The hospital for several years paid $3,000 per month for 24-hour on-call coverage, provided mostly by Mr. Bhan, and later offered to pay a prospective new MDA $2,000 per month for on-call coverage. CR 246 (Menaugh depo., Vol. II) at 14:8-26; CR 24 (Menaugh depo., Vol. III) at 373:13-24; Ex. 197; Ex. 184.

here, in *Klor's* the defendants showed only that consumers had other choices, because Klor's was not the only competing retailer. This Court held that no defense. Perforce, if the suppliers in *Klor's* had agreed to boycott all small retailers in San Francisco as a class, the Court would not have hesitated to find *that* boycott illegal *per se*. The class-based exclusion showing in this case must be held *per se* unlawful as long as *Klor's* remains valid law, unless some affirmative justification accepted by this Court appears in the record.[11] None does.

## II. THE DECISION CONFLICTS WITH THE THIRD CIRCUIT'S RULING IN A SIMILAR HEALTH CARE ANTITRUST CONTEXT.

The Third Circuit correctly applied the *per se* rule to class-based restraints among health care professionals in *Weiss v. York Hospital*, 745 F.2d 786,

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[11] The Ninth Circuit speculated that the all-MD anesthesia policy "*may* actually sharpen competition by making Manteca a more attractive competitor in the patient market." 929 F.2d at 1412 (emphasis added; footnote omitted). However, defendants presented no evidence that *any* patient, nor any surgeon for that matter, *ever* chose another hospital over Manteca Hospital in order to avoid receiving anesthesia from a CRNA. Even assuming *arguendo* that some patients might prefer an all-MDA hospital, the record evidence does not show any benefit to competition among area hospitals for surgical patients. As the district court noted, "There is no evidence to suggest the distribution of M.D. anesthesiologists in the area, or the ratio between nurse anesthetists and anesthesiologists." 669 F. Supp. at 1007 [Ex. 423:19-21]. Thus the record cannot support any statistical comparison between patient location and anesthesia provider distribution.

818-822 (3d Cir. 1984).[12] The conflict between *Weiss* and *Bhan II* is one of tremendous importance because of the ability of physicians in most hospitals to force class-based exclusions of non-MD professionals who provide overlapping services. See, Note, *Denying Hospital Privileges to Non-Physicians: Does Quality of Care Justify a Potential Restraint of Trade?*, 19 INDIANA L.REV. 1219, 1241 (1986).

The inherent conflict of interest that arises when physicians pass judgment on their competitors means that doctors control the hospital access of non-MD professionals, including independent providers such as Mr. Bhan. As hospital privilege decisions are usually intramural, class-based exclusions can be expected to arise hospital-by-hospital. The potential for harm to competition does not depend on the number or proximity of other hospitals where the exclusion has not yet taken place. Indeed, that is precisely the teaching of *Pinhas*.

*Pinhas* rejected a market definition approach virtually indistinguishable from that which confused both lower courts in this case. There the Court emphasized that only one type of professional service, ophthalmology, and not "the full range of activities conducted at a general hospital," bore the brunt of the

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[12] In *Weiss* the Third Circuit affirmed an injunction in favor of a Rule 23(b)(2) class of osteopathic doctors against exclusion from hospital privileges at the behest of allopathic physicians (those traditionally called "MDs"). The Court of Appeals remanded for a new trial only as to the named plaintiff's damage claim, holding Rule of Reason analysis appropriate to that claim only because the defendants had affirmatively challenged Dr. Weiss's professional competence. In this case defendants have *never* challenged Mr. Bhan's competence, and injunctive relief against the class-based exclusion remains worthy of consideration.

restraint. *Pinhas*, 114 L.Ed.2d at 375, 59 U.S.L.W. at 4495-4496. Similarly in this case, only one type of professional service, anesthesia, was the target of the restraint, not competition among hospitals for all types of patients.

The Ninth Circuit's rationale for refusing to apply the *per se* rule is a rehashing of the shopworn logic that health care markets are mysterious to the courts. The opinion makes no effort to distinguish subjective quality of care concerns from procompetitive economic effects. See 929 F.2d at 1412 n.8 ("We are not suggesting the defendants' justification that the doctors are better than the nurses is always true. ... Under a rule of reason inquiry, the plaintiff can always present evidence that the defendants' assertions of competitive benefits are untrue and disingenuous.") This reasoning is particularly ironic since Respondents never argued in the Ninth Circuit that patient care differences could render the restraint reasonable.[13] And, as discussed below, there is no factual basis for the Court's speculation that the restraint "may" benefit competition in the broader market for hospital services.

The holding in this case is another in a line of Ninth Circuit opinions by Judge Sneed refusing to apply *per se* rules. This Court has repeatedly rejected those efforts in health care and other contexts. In *Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1982) this Court rejected a remarkably similar rationale to that applied in this case by Judge Sneed:

> Judge Sneed explained his reluctance to apply the per se rule substantially as follows: The

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[13] See Appellant's Reply Brief filed in the Court of Appeals at 13.

> record did not indicate the actual purpose of the maximum-fee arrangements or their effect on competition in the health care industry. It was not clear whether the assumptions made about typical price restraints could be carried over to that industry. Only recently had this Court applied the antitrust laws to the professions. Moreover, there already were such significant obstacles to pure competition in the industry that a court must compare the prices that obtain under the maximum-fee arrangements with those that would otherwise prevail rather than with those that would prevail under ideal competitive conditions.

457 U.S. 332, 338 n. 4; *see also, Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*rev'd per curiam on petition for certiorari*) *reh'g denied*, 448 U.S. 911 (1980) (fixing of credit terms). The courts have had nearly ten years' more experience applying the antitrust laws to the professions since *Maricopa*. Filling hospital beds and lowering doctor's malpractice premiums are not matters of "public service or ethical norms" (*Maricopa*, 457 U.S. at 348-349, quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975)). Failing to identify and remedy these naked restraints in health care services at this late date is like admiring the emperor's new clothes. *See Maricopa*, 457 U.S. at 349-351.

## III. THE DECISION'S RELIANCE ON PATIENT CARE CONCERNS CONFLICTS WITH THE WELL-REASONED OPINIONS OF THE SEVENTH CIRCUIT IN *WILK v. AMERICAN MEDICAL ASSOCIATION*

One of the reasons that the court of appeals refused to apply *per se* rules to defendants' class-based discrimination against CRNAs was an imagined "patient care" difference *Bhan II*, 929 F.2d 1412 n. 7 (comparing ruling in favor of podiatrists discriminated against in favor of orthopedists). Assuming *arguendo* that such concerns have any place in antitrust policy, the Ninth Circuit should have applied the test set forth in *Wilk v. American Medical Association*, 895 F.2d 352, 362 (7th Cir. 1990) ("*Wilk II*"), *cert. denied*, 111 S.Ct. 2621.

Even if there were evidence of an objective "patient care" difference,[14] it would not, without more, support the judgment in this case. Beginning with *American Medical Association v. United States*, 317 U.S. 519, 528-533, (1943), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-787 (1975), this Court has repeatedly, and with increasing determination, instructed that quality or safety concerns in medical or other professional fields do not justify private restraints on competition.

In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693-696 (1978), the Court rejected public safety justifications for the engineering

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[14] There was indisputably no evidence of patient care differences in this case. See note 3 re the quality of Mr. Bhan's anesthesia care, note 5 re some surgeons' preference for Mr. Bhan over Dr. Cull, and note 18 citing scholarly studies finding CRNA and MDA clinical outcomes to be equal.

society's ethical rule against competitive bidding. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-464 (1986), the Court refused to accept a dentist group's desire to promote better dental care as a justification for a concerted refusal to turn over X-rays to insurers. In *Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1982)[15], and *Jefferson Parish Hospital District No. 2 v. Hyde*, 446 U.S. 2 (1984)[16], the Court rejected medical quality defenses and held that where appropriate, rules of *per se* illegality will be applied to the health care professions.

A common thread running through these Supreme Court decisions is that professional concerns alone will not render a trade restraint reasonable in the absence of a benefit to *competition*. In so holding, the Court merely reaffirmed the formulation of the Rule of Reason in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

> [E]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or destroy competition.*

(Emphasis added). Thus, unless the justification is based on increasing competition, it is not relevant to Rule of Reason analysis. As the Court later explained:

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[15] *Maricopa* held unlawful *per se* a maximum price-fixing scheme despite potential benefits to patients and, arguably, to the health care economy.

[16] *Hyde* declined to hold the *per se* rule inapplicable to tying arrangements in health services.

"Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers*, 435 U.S. at 688.

Dicta in *Goldfarb*, 421 U.S. at 788 n. 17 (1975), *Professional Engineers*, 435 U.S. at 696 and *Maricopa*, 457 U.S. at 348-349, left open the possibility that different antitrust rules may apply to restraints resulting from the "public service and ethical norms" role of professional associations. Whether The Court had in mind restraints arising from private agreements and resulting hospital privilege denials or revocations is to be doubted. Moreover, in its second consideration of "patient care" justifications,[17] the Seventh Circuit acknowledged that arguably this Court's recent precedents leave no room for a "patient care" defense in any health care antitrust context. *Wilk II*, 895 F.2d at 362. See generally, T. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis*, 51(1) LAW AND CONTEMPORARY PROBLEMS 273 (Spring 1988).

In *Wilk II* the Seventh Circuit recognized that this Court has repeatedly rejected quality or safety justifications for restraining trade. Moreover, *Wilk II* held that any such defense must derive from concerns which are (1) genuine, (2) objectively reasonable, (3) not mixed with selfish or anticompetitive motives, and (4) implemented in the least restrictive manner possible. *Wilk II*, 895 F.2d at 362. Defendants presented

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[17] The Seventh Circuit originally defined the elements that the AMA would have to prove to sustain a "patient care defense" in a prior opinion in the same case, *Wilk v. American Medical Ass'n*, 719 F.2d 207, 222-227 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984) ("*Wilk I*").

woefully insufficient evidence to sustain such an affirmative defense in this case. At a minimum, assuming *arguendo* that "quality of care" can be a defense, it would present a triable issue of fact, precluding summary judgment.

First, no evidence exists that MDAs provide better or safer anesthesia care than CRNAs.[18] Second, because Mr. Bhan presented evidence of anticompetitive motive -- the desire to limit the number of anesthesia providers to enhance MDA incomes -- the third element of the *Wilk* test either cannot be met or, at best, turns on disputed mental states. Finally, defendants did not even attempt to argue that eliminating CRNAs as a class would implement their asserted patient care justifications in the manner the least restrictive of competition. Under the *Wilk* test, if summary judgment was merited, it should have been for Mr. Bhan.

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[18] Petitioner is aware of no evidence, in the record or elsewhere, indicating that CRNA care is inferior to that of MDAs. To the contrary, two published medical studies indicate that the involvement of an MDA does *not* improve anesthesia outcomes. A. Bechtoldt, Jr., MD, *Committee on Anesthesia Study: Anesthetic-Related Deaths: 1969-1976*, 42 NORTH CAROLINA MEDICAL JOURNAL 253 (April 1981); W. Forrest, Jr., MD, *Outcome -- The Effect of the Provider*, in HEALTH CARE DELIVERY IN ANESTHESIA (R. Hirsh, MD et al., eds. 1980).

Even the Ninth Circuit's passing observation that MDAs "are trained to perform certain complicated procedures that nurse providers cannot perform" (929 F.2d at 1407) finds no support in the record.

## IV. THE DECISION MISAPPLIES THIS COURT'S REASONING IN *FTC v. INDIANA FEDERATION OF DENTISTS*

Ironically, the Ninth Circuit opinion acknowledges but fails to apply the teachings of *Indiana Federation of Dentists*. *Bhan II*, 929 F.2d at 1413 ("A full-blown market analysis is not necessary."). The court erred *both* in addressing noneconomic issues[19] *and* in speculating, without evidence, that excluding CRNAs could enable a hospital to compete better for patients.[20] First, the opinion fails to acknowledge that the exclusion of a class of lower-priced competitors from a hospital inherently reduces competition there, even if, *arguendo*, some surgeons or patients would go elsewhere in order to have their chosen anesthetist. Second, it fails to specify any basis for assuming *either* that some patients may choose the hospital with all-MD anesthesia *or* that, if so, that benefit to a single hospital will increase competition in the hospital services market. More fundamentally, the opinion eviscerates the "quick look" test represented by *Indiana Federation of Dentists* by implicitly requiring a thorough analysis not only of the market affected by the restraint but of other markets embracing a multitude of other services. *Cf. Pinhas*, 114 L.Ed.2d at 375, 59 U.S.L.W. at 4495-4496.

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[19] Indeed, the court of appeals refers to "the defendants' justification that the doctors are always better than the nurses" (929 F.2d at 1412 n. 8) -- a noneconomic justification.

[20] Even such a benefit would be a benefit to one hospital competitor, not necessarily to hospital competition.

As the opinion notes, *Indiana Federation of Dentists* accepted as sufficient a finding that the dentists' conspiracy had succeeded in thwarting insurers' demands for x-rays in "at least two localities." 929 F.2d at 1413 n. 10. Nowhere did the Court find those towns to be markets, nor did it look for any proof that the restraint had affected dental charges, insurance reimbursement levels, dental insurance premiums or the quality of dental care in those towns or elsewhere. Most notably, the Court did not ask whether the dentists in the two affected towns were able to attract more or fewer patients, nor whether dental patients left those towns to patronize dentists elsewhere. It was enough, the Court held, that the dentists had attained their objective of keeping x-rays away from insurers.

It would be counterproductive to require a plaintiff such as Mr. Bhan to apply full-blown Rule of Reason analysis to the possible impact on hospitals competing for patients when his exclusion was from the market for anesthesia services. How can such *unproven* "assertions of competitive benefits" support a conclusion that there is no triable issue of fact? The opinion only postulates that there "may" be such benefits and yet ignores the obvious anticompetitive effects of doctors agreeing to cut out lower-cost non-doctor competition. Apparently the Ninth Circuit would require an antitrust plaintiff to study every market that a restraint could affect and negate the *possibility* of benefits to competition. This is precisely the kind of costly investigation that this Court refused to require in *Indiana Federation of Dentists*.

## V. THE NINTH CIRCUIT'S REASONING FLIES IN THE FACE OF THE NEED, RECOGNIZED BY THIS COURT AND BY CONGRESS, TO STEM ANTICOMPETITIVE CONDUCT THAT RAISES HEALTH CARE COSTS.

This Court has repeatedly refused to favor health care and other professionals with lenient antitrust rules. *See, Professional Engineers*, 435 U.S. at 688-692 (1978); *Maricopa*, 457 U.S. at 348-351 (1982); *Indiana Federation of Dentists*, 476 U.S. at 462-465 (1986); *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 110 S.Ct. 768, 774-776, (1990). Conduct which has the purpose or effect of reducing or eliminating competition among health care providers has received increasing antitrust scrutiny. *Pinhas* (ophthalmologist excluded from one hospital through peer review process); *Patrick v. Burget*, 486 U.S. 94 (1988) (exclusion of competing surgeon through bad faith use of peer review); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (restraints imposed by psychiatrists against psychologists). Indeed, the Federal Trade Commission is not the only federal agency concerned with antitrust rules as they relate to hospital access decisions. See, *Physician-Antitrust Issues -- GAO Views*, Trade Reg. Rep. (CCH) ¶ 50,062 at p. 48,717 (report to Congress, July, 1991).

In recent years Congress has increasingly emphasized the role of competition in health care markets, as have state legislatures. In 1979, in reviewing federal health planning legislation which required an administrative "certificate of need" for the development of new health care facilities, Congress added the promotion of competition as a priority in

health planning. Former 42 U.S.C. § 300k-2(a)(17),[21] Pub.L. 96-79, Title I, §§ 102(a), 103(a), (b), 93 Stat. 594. Similarly, as the Ninth Circuit recently observed in another health care antitrust decision, "California has passed a number of amendments to the local hospital district law over the years [which] contemplate that the districts operate in a competitive environment" and has legislatively deregulated health care services by, *inter alia*, abandoning health planning laws that required certificates of need. *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, ___ n. 12 [91 C.D.O.S. 5477, 5479 n. 12] (9th Cir., July 15, 1991) (amended opinion).[22]

Finally, the Health Care Quality Improvement Act of 1986, Pub.L. 99-660, Title IV, 100 Stat. 3784 (1986), shows Congressional recognition of the antitrust problems that non-physicians face in hospitals. In providing a qualified exemption from antitrust damage liability for physician peer review activities, Congress took care to exclude from that exemption professional review activities affecting "nurses, other licensed health care practitioners, or other health professionals who are

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[21] The pertinent added policy priority was "(17) The strengthening of competitive forces in the health services industry wherever competition and consumer choice can constructively serve, in accordance with subsection (b) of this section to advance the purposes of quality assurance, cost effectiveness, and access." Subsection (b), expressed legislative findings that "the effect of competition on decisions of providers respecting the supply of health services and facilities is diminished" and urged health planners to "give priority (where appropriate to advance the purposes of quality assurance, cost effectiveness, and access) to actions which would strengthen the effect of competition on the supply of such services." Former 42 U.S.C. § 300k-2(b)(1), (2). Repealed, Pub.L. 99-660, Title VII, § 701(a), 100 Stat. 3799.

[22] California statutes also recognize the specialized discipline of nurse anesthesia, Cal. Bus. & Prof. Code §§ 2816(b), 2830.

not physicians." 42 U.S.C. §§ 11111, 11115(c). Petitioner respectfully submits that in making this exclusion Congress intended that the courts remain vigilant against physician restraints on non-physician competition such as the elimination of CRNAs at Manteca Hospital.

## VI. EVEN IF THE JUSTIFICATIONS POSITED BY THE COURT OF APPEALS ARE VALID, SUMMARY JUDGMENT WAS IMPROPER.

Even under the Ninth Circuit's antitrust reasoning, summary judgment was not merited. The opinion acknowledges that the court was merely speculating that the restraint "may" benefit competition in the hospital-patient market. *Bhan II*, 929 F.2d at 1412. Indeed, the court concedes that the boycott would be unlawful if Mr. Bhan could prove that price differences motivated his exclusion. *Ibid.*

Moreover, the court's recitation of the hospital's "three justifications"[23] ignores substantial fact disputes, such as whether the hospital's prior anesthesia arrangements ever entitled it to 24-hour MDA backup, and whether there is any substance under California law to surgeons' purported fears that "they would be held legally accountable for [hypothetical] mistakes made by" a CRNA. *Ibid.* Finally, the opinion ignores substantial record evidence, such as hospital

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[23] Briefly, they are: (1) surgeons' fears of vicarious liability for CRNA errors (misplaced under California law, *Truhitte v. French Hospital*, 128 Cal. App. 3d 332, 348, 180 Cal. Rptr. 152 (1982)); (2) the desire for 24-hour MDA coverage (which the hospital had refused to underwrite); and (3) the *feeling* that MDAs are better trained than CRNAs. *Bhan II*, 929 F.2d at 1408.

administrator Menaugh's deposition testimony,[24] that the conspirators' motives were anticompetitive.

It is axiomatic that summary judgment was inappropriate with such facts in dispute. Even if the Ninth Circuit's legal standards are correct, it should not have affirmed on the basis of its speculation or "metaphysical doubt" as to competitive impact in the face of such material issues of fact. *Cf.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

## CONCLUSION

As this Court recognized this year in *Pinhas*, denials of access to hospital privileges that result from group boycotts affect competition even where other hospitals compete for patients in the broader hospital care market. Where local hospital access decisions reflect the economic motivation of hospitals to side with physicians against non-physicians, *per se* treatment is appropriate. At a minimum, mere "metaphysical doubt" about competitive effects does not justify summary denial of antitrust remedies.

This case also shows that the lower courts must again be cautioned not to confuse subjective quality or safety concerns with procompetitive benefits, whether such benefits are properly treated as affirmative justifications or Rule of Reason defenses. State legislatures, not doctors, decide the scope of activities of licensed health professionals. The desire to improve quality or safety, standing alone, cannot counterbalance the anticompetitive impact of agreements to close the

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[24] See note 4, *supra*.

competitive gateway to a lower-priced class of health care professionals.

For the above reasons, the writ should issue and the judgment of the court of appeals be reversed.

Respectfully submitted,

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## APPENDIX TO PETITION FOR CERTIORARI

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## APPENDIX TO PETITION FOR CERTIORARI 1

### 1. *Bhan v. NME Hospitals*, 929 F.2d 1404 (9th Cir. 1991) ("*Bhan II*")

VINOD C. BHAN, C.R.N.A.,

*Plaintiff-Appellant,*

v.

NME HOSPITALS, INC., a Delaware Corp., dba: MANTECA HOSPITAL, NATIONAL MEDICAL ENTERPRISES, INC., a Nevada Corp., CALIFORNIA SOCIETY OF ANESTHESIOLOGISTS, INC., a California Corp., JOHN E. MENAUGH, YONG SUK, M.D.,

*Defendants-Appellees.*

Nos. 87-2727, 87-2951.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Dec. 11, 1990.
Decided March 25, 1991.

Timothy E. Morgan, San Francisco, Cal., H.E. Christian Peeples, Oakland, Cal., Michael I. Spiegel, Spiegel, Liao & Kagay, and Stephen Kaus, Kaus & Kerr, San Francisco, Cal., for plaintiff-appellant. Robert Fabrikant, McKenna & Cuneo, Washington, D.C., and James J. Banks, Damrell, Damrell & Nelson, Michael C. Normoyle, Normoyle & Newman, Modesto, Cal., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before SNEED, SCHROEDER and CANBY, Circuit

Judges.

SNEED, Circuit Judge:

This is an antitrust case concerning the exclusion of a class of nonphysician anesthesia providers from a hospital. Plaintiff Vinod Bhan charged the hospital with violations of §§ 1 & 2 of the Sherman Act.[1] The district court granted summary judgment for defendants. Bhan appeals the summary judgment as well as discovery sanctions imposed by the magistrate. We affirm both rulings.

## I.

## FACTS AND PROCEEDINGS BELOW

Vinod Bhan is a certified registered nurse anesthetist ("CRNA") who worked at Manteca Hospital between 1979 and 1983. CRNAs are licensed to perform many of the same anesthesia services as physician anesthesia providers ("MDAs"). The physician providers have a medical degree and are trained to perform certain complicated procedures that nurse providers cannot perform. The physicians also charge higher fees than the nurses.

Manteca Hospital is a forty-nine bed facility located in a town of 37,000 people. Although Manteca Hospital is the only hospital in its town, at least five hospitals in neighboring towns are approximately thirty minutes drive from Manteca Hospital. It is generally

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1 Defendants California Society of Anesthesiologists, California League of Anesthesiologists, and Yong Suk have been dismissed from the case. The remaining defendants are: NME Hospitals, Inc., owner and operator of Manteca Hospital; National Medical Enterprises, Inc., the parent company of NME; and John Menaugh, the hospital administrator.

accepted in the health industry and uncontested in this case that hospitals within thirty minutes traveling time of each other compete for patients. *Bhan v. NME Hospitals, Inc.*, 669 F.Supp. 998, 1006 (E.D.Cal.1987). In addition, five other hospitals are located in the general area, although the record is unclear about precisely how close these hospitals are to Manteca Hospital.

Most of the doctors who have staff privileges at Manteca Hospital also have staff privileges at hospitals in Stockton and Modesto. In addition, many of the doctors at Manteca Hospital arrange for "coverage" by doctors based outside of the town of Manteca, most commonly in Tracy, Stockton, or Modesto. During the period that Bhan worked at Manteca Hospital, he also worked occasionally at hospitals in eight other communities and at certain family planning clinics. [2] [929 F.2d 1404, *1407]

Some hospitals in the area do not use nurse anesthetists, but at least one hospital in the area, and possibly two, do. In addition, doctors who perform outpatient surgery in their offices use nurse anesthetists. Manteca Hospital obtained anesthesia providers from Associated Anesthesia Services ("AAS"), an organization that supplied the hospital with physician and nurse anesthesia providers and handled all billing and collections. AAS assigned Bhan and one physician to cover the Hospital's requirements. The hospital and its surgeons became unhappy with the anesthesia coverage provided by AAS because of constant turnover in the physician provider position and lack of 24-hour coverage by a physician provider.

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[2] See Bhan, 669 F.Supp. at 1007. Bhan appears to have earned eighty percent of his income as an anesthetist from Manteca Hospital and twenty percent from these other sources. See Appellant's Opening Brief at 11.

The hospital asked AAS to provide an additional physician. AAS refused because it felt that the volume of work at the hospital could not support three anesthesia providers. The hospital then notified AAS that its contract would not be renewed. At the time of this notice, Mr. Bhan and Dr. Cull, a physician anesthesia provider, worked at Manteca under the AAS contract. Dr. Suk, a physician anesthesia provider from a neighboring town, also had expressed interest in moving to Manteca to work at the hospital.

The hospital notified Dr. Cull that after the AAS contract expired, he would no longer be allowed to work there and that the hospital intended to form an exclusive arrangement with some combination of anesthesia providers. In response, Cull's attorney threatened legal action if the hospital signed an exclusive agreement that did not include Cull. At this point, the hospital learned that a Fifth Circuit decision had raised doubts about the legality under the antitrust laws of an exclusive contract for anesthesia services at a hospital. *See Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286 (5th Cir.1982), *rev'd*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). The hospital decided not to pursue any exclusive contracts.

Instead, the hospital implemented an MDA-only policy, thus risking being impaled on the other horn of an antitrust dilemma. Any physician anesthesia provider under this new policy would be allowed to apply for staff privileges but no nurses could apply. The hospital offered three justifications. First, surgeons were afraid they would be held legally accountable for mistakes made by nurses because state law required the surgeon to "sign off" on the nurse's patient report. No sign-off was required for physicians. Second, the hospital felt that 24-hour coverage by a physician provider was essential in case of complicated emergencies. Third, the hospital felt physician anesthesia providers were better trained than nurse

anesthesia providers. Malpractice claims and the cost of malpractice insurance lurk behind these justifications. Dr. Suk and Dr. Cull became the two primary anesthesia providers under the new policy. They split the coverage schedule.

Bhan, the excluded provider, alleges that patient care and legal liability were smokescreen issues. He claims that Suk and Cull conspired with the hospital to eliminate him and other potential nurse applicants from competing in the local market in order to protect the doctors' income. Bhan [929 F.2d 1404, *1408] arrangement as a group of suppliers (the doctors) convincing a buyer (the hospital) to join a conspiracy to boycott the suppliers' lower-priced competitors.

The district court initially dismissed the claim on the ground that Bhan lacked antitrust standing. This court reversed. The district court then granted defendants' motion for summary judgment. Bhan appeals the summary judgment grant as well as discovery sanctions imposed by the magistrate and affirmed by the district court.

## II.

## JURISDICTION AND STANDARDS OF REVIEW

[1] The district court had jurisdiction under 15 U.S.C. §§ 15, 22 (1988). This court has appellate jurisdiction according to 28 U.S.C. § 1291 (1988). A grant of summary judgment is reviewed de novo. *Kruso* [929 F.2d 1404,*1409] *v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, --- U.S. ----, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990).

III.

SUMMARY JUDGMENT

[2][3] Summary judgment is appropriate where no genuine issue of material fact exists and a party is entitled to prevail in the case as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Fed.R.Civ.P. 56(c). The party requesting summary judgment has the initial burden to show that there are no genuine issues of material fact. *T.W. Elec. Serv. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 632 (9th Cir.1987). He does not necessarily need to put on evidence to negate his opponent's claim; he may simply point to portions of the pleadings, admissions, answers to interrogatories, and depositions which, along with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

If the moving party satisfies his initial burden, the opposing party may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists. Fed.R.Civ.P. 56(e). In addition, the dispute must be genuine. The "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). [4] In general, it is difficult to resolve antitrust cases on summary judgment because of their factual complexity. See *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 180, 93 L.Ed.2d 115 (1986). This does not mean, however, that a district court may not award summary judgment when appropriate. In fact, an appropriate award of summary judgment may save the

parties and the courts from unnecessarily spending the extraordinary resources required for a full-blown antitrust trial. The Supreme Court's decision in Matsushita significantly clarified the standards for resolving summary judgment cases in the antitrust arena. See *Matsushita*, 475 U.S. at 585-88, 106 S.Ct. at 1355-57; see also *Bhan*, 669 F.Supp. at 1004-05. Since that time, this court has shown on numerous occasions that summary judgment on an antitrust claim may be appropriate. *See, e.g., Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1488-92 (9th Cir.1991); *R.C. Dick Geothermal Corp. v.*
[929 F.2d 1404, *1409]
*Thermogenics, Inc.*, 890 F.2d 139, 152-53 (9th Cir.1989) (en banc); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 161-63 (9th Cir.1989); *Thurman Indus., Inc. v. Pay'N Pak Stores, Inc.*, 875 F.2d 1369, 1380 (9th Cir.1989); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1175 (9th Cir.1988); *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976, 984 (9th Cir.1988).

## IV.

## SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." 15 U.S.C. § 1. Long ago it was recognized that this language cannot be read strictly. Were it so read, a vast array of competitive activities, could be considered "restraints of trade" and therefore illegal. See *United States v. Topco Assocs.*, 405 U.S. 596, 606, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972). The Supreme Court many years ago, however, ruled that the Act was intended to prohibit only those restraints of

trade that are unreasonable. [3]

[5] Thus, to establish a claim under § 1 of the Sherman Act, the plaintiff must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce. *T.W. Elec.*, 809 F.2d at 632-33. The district court found that the plaintiff offered sufficient evidence of a conspiracy to survive summary judgment and that the restraint affected interstate commerce. The parties do not challenge these findings. As the district court saw it, however, the plaintiff's showing on the unreasonable restraint of trade issue was insufficient to survive the defendants' showing and summary judgment motion. The only issue raised on appeal, therefore, is whether the practice was an unreasonable restraint of trade.

[6] To determine whether a practice unreasonably restrains trade, we sometimes apply a "rule of reason" analysis. *See Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir.1988), *cert. denied*, --- U.S. ----, 110 S.Ct. 140, 107 L.Ed.2d 99 (1989). Under this test, we must analyze the degree of harm to competition along with any justifications or pro-competitive effects to determine whether the practice is unreasonable on balance. *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir.1988).[4] The focus is on the actual

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[3] The classic formulation appears in the Chicago Board of Trade opinion: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918) (Brandeis, J.)

[4] Areeda describes the test in the following manner: First, what harm to competition results or may result from the collaborators' activities? Second, what is the object they are trying to

effects that the challenged restraint has had on competition in a relevant market.

[7] Some practices, however, are so likely to interfere with competition that they violate the Sherman Act per se. In these cases, we do not require evidence of any actual effects on competition because we consider the potential for harm to be so clear and so great. *See R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 151 (9th Cir.1989) (*en banc*) (*per se* rule applies only where experience has established that anticompetitive consequences flow regularly from the practice). Plaintiffs generally seek initially to have the defendant's conduct classified as a per se violation because it greatly simplifies the proof required. Examples of practices which are illegal per se include horizontal price-fixing, division of markets, and certain tying arrangements. *Hahn*, 868 F.2d at 1026; *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16-17, 104 S.Ct. 1551, 1560-61, 80 L.Ed.2d 2 (1984). In addition, some, but not all, boycotts are considered illegal per se. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-94, 105 S.Ct. 2613, 2618-19, 86 L.Ed.2d 202 (1985); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1333 (9th Cir.1986).

In this case, the plaintiff, like others, first argued that the hospital's policy of admitting physician anesthesia providers only was 1) the type of boycott which is illegal per se and 2) if not a per se violation,

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[929 F.2d 1404, *1410]
achieve, and is it a legitimate and significant one; that is, what are the nature and magnitude of the "redeeming virtues" of the challenged collaboration? Third, is the restraint reasonably necessary for the achievement of any such legitimate objectives? That is, are there other and better ways--so-called less restrictive alternatives--by which the collaborators can achieve their legitimate objectives with fewer harms to competition? 7 P. Areeda, Antitrust Law P 1502, at 371 (1986).

then an unreasonable restraint under the rule of reason. The district court, in determining whether a per se violation had occurred, ruled that the hospital's policy had to be analyzed as a tying case rather than a boycott case. The first issue we must address is whether a tying case analysis was proper in this case. If such analysis was improper, we must next decide whether the "boycott" was a per se violation. If neither analysis leads to a per se violation, we must then address this case under the rule of reason. To these tasks we now turn.

**A. Did the District Court Err in Holding That the Hospital's Policy Should Be Analyzed as a Tying Case Under *Jefferson Parish*?**

[8][9] Tying exists when a seller refuses to sell one product unless the buyer also purchases another. To prove an illegal tie, a party must show 1) a tying of two distinct products or services, 2) sufficient economic power in the tying product market to affect the tied market, and 3) an effect on a substantial amount of commerce in the tied market. *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479 (9th Cir.1983). In Jefferson Parish, the Supreme Court found that a hospital had engaged in a tie-in when it required patients who purchase operating room services to purchase the hospital's chosen anesthesia service. *Jefferson Parish*, 466 U.S. at 24, 104 S.Ct. at 1564. The Court, unlike the Fifth Circuit, refused to find an anti-trust violation, however, because the plaintiff failed to show sufficient market power in the
[929 F.2d 1404, *1411]
tying product market. Id. at 25-29, 104 S.Ct. at 1565-67. [10] The district court applied the *Jefferson Parish* analysis to Manteca Hospital's arrangement. The court considered whether the hospital was forcing people who wanted to purchase

surgical services to purchase the services of the hospital's chosen anesthesia provider. The court found that the hospital could not have engaged in such illegal tying because the hospital did not possess sufficient economic power in the market for hospital services (the tying market). In other words, enough competition existed among hospitals in the area that any patient who did not like Manteca's anesthesia provider could go to another hospital.[5]

Bhan does not, and in the light of the Supreme Court's *Jefferson Parish* decision cannot, challenge the court's conclusion that the hospital did not engage in an illegal tying arrangement. Bhan argues, however, that the hospital's actions should not be evaluated as a tying arrangement at all. Rather than looking at the relationship between the hospital and its patients, Bhan asks us to look at the relationship between Manteca Hospital and its suppliers of anesthesia services. As Bhan sees it, Manteca Hospital and the physician anesthesia providers conspired to boycott nurse anesthesia providers. Bhan quite correctly argues that Jefferson Parish does not prevent a court from evaluating the facts of this case as a possible illegal boycott of a class of suppliers. Jefferson Parish merely demonstrates that a hospital's exclusive contract with an anesthesia group may be analyzed as a tie-in. It does not say that such an arrangement must be treated as a tying case or that per se boycott analysis could never apply. Thus, the district court erred in ignoring Bhan's per se boycott claim.

**B. Is the Policy a Boycott Subject To Per Se Condemnation?**

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[5] For a detailed analysis of Manteca's share of the market in which area hospitals competed for patients, see Bhan, 669 F.Supp. at 1018-20.

Boycotts, sometimes called concerted refusals to deal, can exist in a variety of forms. Examples of boycott activity include: 1) two or more firms agreeing not to deal with a competing firm in an industry that requires interaction between competitors, *Silver v. New York Stock Exch.*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (exchange brokers agree not to trade with nonexchange brokers); 2) competing firms refusing to deal with certain firms with whom they have a vertical relationship, *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (dress designers and manufacturers agree not to sell to retailers who continue to deal with "style-pirates"); 3) competing firms engaged in a cooperative venture excluding other competing firms, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (buying cooperative made up of retailers expels a member). [11, 12] As noted above, only certain boycotts are unlawful per se. Nonetheless, the distinction between boycotts that are and those that must be tested under the rule of reason is less than crystal clear. *See Northwest Stationers*, 472 U.S. at 294, 105 S.Ct. at 2619. The line can best be drawn, however, by following the analysis used to separate per se and rule of reason cases in general. Thus, the per se rule should be invoked for a group boycott when the challenged activity would almost always tend to be predominantly [929 F.2d 1404, *1412] competitive. See *Northwest Stationers*, 472 U.S. at 298, 105 S.Ct. at 2621; *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1333 (9th Cir.1986). [13] The practice of which Bhan complains can be cast in the following general terms: physicians conspiring with a hospital to allow only physician, rather than nonphysician, providers to offer services in a particular area. As a result, the hospital eliminates a class of

providers.[6]

This activity does not appear to be one that is always anticompetitive. [7] On the one hand, hospitals must make choices about the types of qualifications a practitioner must have to apply for staff privileges in various fields of practice. *See Jefferson Parish*, 466 U.S. at 30, 104 S.Ct. at 1567 (commenting that hospitals have an unquestioned right to exercise control over staff privileges). These restrictions help it provide more efficient, higher quality service in order to compete against other hospitals. 6 J. von Kalinowski, Antitrust Laws & Trade Regulation § 52.03[1], at 52-45 (1990). This also reduces its malpractice exposure. Thus, the choice of physician over nonphysician providers may actually sharpen competition by making Manteca a more attractive competitor in the patient market.[8]

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[6] The hospital will still consider the individual merits of each physician applicant in granting staff privileges. It has simply decided that only physician providers may apply.

[7] Only one case in this circuit concerns a situation similar to Bhan's. See Hahn v. Oregon Physicians' Serv., 868 F.2d 1022 (9th Cir.1988) (summary judgment denied in case in which podiatrists sued a health plan for discrimination against their class of providers in favor of orthopedists). Although the opinion is unclear, the Hahn court appears to have applied the rule of reason. The court there explicitly followed the logic of Barry, a case in which this circuit applied rule of reason analysis to a group boycott case. See id. at 1031 (discussing Barry v. Blue Cross, 805 F.2d 866 (9th Cir.1986).
In addition, Hahn differs from the case at hand in that 1) Hahn involved a health plan rather than a hospital, perhaps not a material difference, however, and 2) the Hahn defendant went out of its way to state that quality of care could not possibly be an issue in the case, clearly a material difference.

[8] We are not suggesting the defendants' justification that the doctors are better than the nurses is always true. We are merely saying that before deciding to create a new per se category, we must ask whether there are cases within that category in which a comparison of

On the other hand, a plaintiff may be able to establish in a certain situation that the physicians are conspiring to drive the nurses out of business because their services are just as good but cheaper. The hospital may be shown to be acceding to the doctors' wishes because of its wish to retain certain of the doctors' services. In that case, the practice of excluding nonphysician providers as a class would appear to be anticompetitive. In sum, the practice of excluding nonphysicians in favor of physicians is not one that always would have an anticompetitive effect. Given that the effect of the practice is unclear, it is appropriate to apply the rule of reason.

### C. Is the Restraint Illegal Under the Rule of Reason?

[14] It follows that we must examine the practice alleged by the plaintiff under the rule of reason. Under this test, the factfinder must analyze the anticompetitive effects along with any pro-competitive effects to determine whether the practice is unreasonable on balance. *Thurman Indus., Inc. v. Pay'N Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir.1989); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir.1988). [15][16] To meet his initial burden in establishing that the practice is an

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the harms and benefits to competition would find a balance in favor of benefits. If we see the possibility of a significant body of such cases, the category is inappropriate for per se treatment. See P. Areeda, supra, P 1510c, at 421-24 (explaining why a court must consider potential justifications in defining a new per se category); see also Northwest Stationers, 472 U.S. at 289, 105 S.Ct. at 2616 ("per se approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anti-competitive"). Under a rule of reason inquiry, the [Cite as: 929 F.2d 1404, *1412]
plaintiff can always present evidence that the defendants' assertions of competitive benefits are untrue and disingenuous.

unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. See P. Areeda, supra, ¶ 1507b, at 397. Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly. Id.; *see Jefferson Parish*, 466 U.S. at 29, 104 S.Ct. at 1567.[9]

[17] A full-blown market analysis is not necessary. A lesser analysis may show that the restraint has actually produced significant anticompetitive effects, such as a reduction in output. If the plaintiff can make a showing of anticompetitive effects, a formal market analysis becomes unnecessary. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2018-19, 90 L.Ed.2d 445 (1986).[10]

[929 F.2d 1404, *1413]

[18] Should the plaintiff satisfy his initial burden, the defendant must offer evidence of pro-competitive effects. The plaintiff, driven to this point, must then try to show that any legitimate objectives can be

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[9] To survive a summary judgment motion by a defendant on this point, a plaintiff must demonstrate that there are disputed material facts on this question. P. Areeda, supra, P 1502, at 371-72.

[10] In other words, one aspect of the market power inquiry is to ask whether the defendant has the power to do what it allegedly wanted to do--that is, whether the defendant can actually influence the market. In Indiana Dentists, the plaintiffs did not need to present an elaborate market analysis to show that the federation dentists had enough power to produce an effect in the market. The dentists had already done it. The plaintiff there showed that the dentists were actually able to produce the effect they wanted by completely preventing insurers from obtaining x-rays in at least two localities in a case in which the markets were essentially local. Thus, the dentists must have had market power in at least two relevant markets, and their actions clearly met the test of "likely to affect competition."

achieved in a substantially less restrictive manner. Finally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance. P. Areeda, supra, ¶ 1502, at 371-72.[11]

[19] In this case, Bhan stumbles and fails to clear the first hurdle. He fails to meet his burden of showing that the hospital's policy substantially restrains competition in a relevant market. Market definition requires both a geographic and a product dimension. Bhan claims that the relevant product market is the market in which hospitals compete for anesthesia services and the geographic market is the town of Manteca. Bhan's only evidence of the geographic market is that the hospital wanted its anesthesia providers to live in Manteca.[12] Bhan's difficulty is that the geographic limits of the product market exceed that measured by the town of Manteca. Anesthesia services available to hospitals could easily extend beyond the limits of Manteca. Hospitals may acquire them from hundreds of miles away. The fact that the defendant hospital may wish them to reside in Manteca in no way limits the geographic area from which anesthesia services may be acquired and brought

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11 Some of the Hahn language could be read to suggest a different allocation of the burdens in a rule of reason case. See Hahn, 868 F.2d at 1026, 1031 (discussing burdens under Barnes v. Arden Mayfair, Inc., 759 F.2d 676 (9th Cir.1985)). That language, however, refers to the allocation of burdens for determining whether a conspiracy exists. See Hahn 868 F.2d at 1026 (citing the following line of conspiracy cases: Matsushita, 475 U.S. at 574, 106 S.Ct. at 1348; Barnes, 759 F.2d at 680; ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir.1975)). While the existence of a conspiracy was at issue in the Hahn appeal, it is not at issue in this appeal.

12 Even this condition is suspect as evidence of the geographic market given that 1) when Bhan worked at Manteca Hospital, he also worked at hospitals in other towns; and 2) doctors at Manteca hospital used doctors based in other towns to cover for them.

to work in Manteca. Bhan simply has not considered these and other market definition issues. The result is that it cannot be said that the hospital's policy restrains competition in a "relevant market."

[20] Bhan also claims that since he has offered proof of actual anti- competitive effects, a formal market analysis is unnecessary. The only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition.[13]

In short, Bhan has failed to meet his initial burden of showing that the hospital's policy substantially restrained competition in a relevant market. Thus, Bhan's claim also fails under a rule of reason analysis. [21] The district court also granted summary judgment for defendants on Bhan's § 2 Sherman Act claims for monopolization and attempted monopolization. In a footnote of his opening brief, Bhan purports to appeal this grant as well; however, he offers no legal analysis or discussion at all. He also alleges a per se illegal market division in the same footnote for which he offers no support. We treat these unargued claims as abandoned. See *Movie 1 & 2 v. United Artists Communications*, 909 F.2d 1245, 1253-54 (9th Cir.1990).

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[13] The Supreme Court also has suggested that elaborate market analysis may not be necessary in a rule of reason case where there is a "naked" agreement not to compete in terms of price or output. In such a case, the

[929 F.2d 1404, *1414]

defendant must present some justification based on pro-competitive effects even if the plaintiff has failed to provide adequate market analysis. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109-10, 104 S.Ct. 2948, 2964-65, 82 L.Ed.2d 70 (1984) (concerning restrictions on the output and price of televised college football games); see Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 729-30, 108 S.Ct. 1515, 1522-23, 99 L.Ed.2d 808 (1988) (describing naked restraints); Indiana Dentists, 476 U.S. at 460, 106 S.Ct. at 2018 (same). No such agreement exists in this case.

## IV.

## THE DISCOVERY SANCTIONS

One of Bhan's expert witnesses arrived unprepared for a scheduled deposition. The expert had planned to base his conclusions on a report published by a national group, but the report had been temporarily withdrawn to correct an error. After answering a few initial questions, the expert stalked out of the deposition. Bhan's counsel tried unsuccessfully to convince him to stay. Bhan's counsel then offered to reschedule the deposition or to substitute another expert whom they had not planned to present. Defendants objected. The magistrate excluded the expert from trial and awarded $9,364.21 in sanctions for travel, preparation, and attendance costs.

[22][23] A district court may refer pretrial issues to a magistrate under 28 U.S.C. § 636(b)(1) (1988). The statute provides that the magistrate's decision on a nondispositive issue will be reviewed by the district judge under the clearly erroneous standard. *United States v. Raddatz*, 447 U.S. 667, 673, 100 S.Ct. 2406, 2411, 65 L.Ed.2d 424 (1980) (describing the difference between dispositive and nondispositive issues in a case concerning dispositive issues); see 28 U.S.C. § 636(b)(1). Decisions on dispositive issues will be reviewed de novo. *Raddatz*, 447 U.S. at 673, 100 S.Ct. at 2411; 28 U.S.C. § 636. Nondispositive issues include discovery sanctions. *Merritt v. International Bhd. of Boilermakers*, 649 F.2d 1013, 1018 (5th Cir. Unit A June 1981); 12 C. Wright & A. Miller, Federal Practice & Procedure § 3076.5, at 44 (Supp.1990).

### A. Is the Statute Unconstitutional?

[24] Bhan argues that the portion of the statute

providing for clearly erroneous review of nondispositive issues is unconstitutional. He contends that with such a cursory review, Article III judges are permitted to delegate too much power without retaining proper control over the proceeding. Although a number of courts have applied this portion of the magistrate statute in the fourteen years since the statute was [929 F.2d 1404, *1414]
discusses the constitutionality of the section. Two other areas of delegation to magistrates, however, have been decided. First, the statute allows a district court to delegate dispositive issues to a magistrate subject to de novo review. The Supreme Court upheld the constitutionality of this provision on the ground that de novo review provided sufficient oversight. See *Raddatz*, 447 U.S. at 681-84, 100 S.Ct. at 2415-17. Second, parties in a civil case may agree to have a case decided by a magistrate sitting without a jury. The Ninth Circuit en banc upheld this grant of power, stressing the consensual nature of the referral statute. *See Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir.1984) (*en banc), cert. denied*, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984). Neither of these cases explicitly controls the issue Bhan raises. Nevertheless, the clearly erroneous standard of review is sufficient here to prevent the delegation to a magistrate of the powers to decide a routine discovery matter from constituting an unconstitutional delegation of authority.

B. Was the Magistrate's Order Clearly Erroneous?

[25] Bhan argues that the award was clearly erroneous given his counsel's efforts to mitigate. However, counsel should be able to produce his witness properly prepared at the time scheduled. The issue of whether counsel acted properly can best be decided by the magistrate who is on the spot. The award is not clearly erroneous.

[26] Bhan also objects that he did not have proper notice that he could receive sanctions. He argues that the magistrate's order did not list specific times for depositions, but merely required the parties to work out agreeable times for deposing experts. Moreover, Bhan objects that the magistrate's order was not reduced to writing until after the sanctions were imposed, despite a local rule stating that a magistrate's orders "shall be in writing." See Local Rule 304(a) of the United States District Court for the Eastern District of California.

[27] Bhan is incorrect. Discovery sanctions may be imposed for failure to comply with an oral order. *Professional Seminar Consultants, Inc. v. Sino Am. Technology Exch. Council, Inc.*, 727 F.2d 1470, 1474 (9th Cir.1984). Moreover, any counsel should know that producing an unprepared expert is sanctionable.

[28] Bhan also objects that the award was excessive. Given that the expert had not produced any reports for defendants to review ahead of time, he argues that defendants must have charged for time incurred for general case preparation rather than specific preparation for this witness. *See United States v. National Medical Enters., Inc.*, 792 F.2d 906, 910 (9th Cir.1986) (compensatory sanctions should be limited to the actual losses sustained). Even without a report to review, however, defendants had to spend time preparing for this witness. Both the magistrate and the lower court have adequately reviewed the defendants' declaration of costs. The award was not clearly erroneous.

[29] Finally, defendants ask that this panel award their attorney's fees spent in defending the grant of sanctions. They cite this court's holding in *Mickwee v. Hsu* that "[w]hen the trial court has imposed sanctions for failure to comply with discovery and the order is appealed, as a general rule attorney's fees should be awarded where the discovery order is upheld." *Mickwee v. Hsu*, 753 F.2d 770, 770 (9th Cir.1985) (*per curiam*).

Considering that a constitutional issue was raised and herein decided, we will not award any attorney's fees incurred by the defendants in defending the grant of sanctions. AFFIRMED.

**2. *Bhan v. NME Hospitals*, 772 F.2d 1467 (9th Cir. 1985) "*Bhan I*")**

VINOD C. BHAN, C.R.N.A., Plaintiff-Appellant,

v.

NME HOSPITALS, INC., a Delaware corporation, dba MANTECA HOSPITAL, et al.,
Defendants-Appellees.

No. 84-2256.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 12, 1985.
Decided Oct. 2, 1985.

Nurse anesthetist brought action alleging that hospital's policy of allowing only M.D. anesthesiologists to perform anesthesia services in hospital's operating rooms violated federal antitrust laws. The United States District Court for the Eastern District of California, Lawrence K. Karlton, Chief Judge, dismissed the action, and nurse appealed. The Court of Appeals, Merrill, Circuit Judge, held that nurse was proper party to bring the action. Reversed and remanded.

Timothy E. Morgan, San Francisco, Cal., H.E. Christian Peeples, Oakland, Cal., for plaintiff-appellant.

John K. Van de Kamp, Atty. Gen., Andrea Sheridan Ordin, Asst. Atty. Gen., Sanford R. Gruskin, Owen Lee Kwong, Dist. Attys. Gen., Michael R. Granen, Los Angeles, Cal., for amicus State of Cal.

Jeffrey Klurfeld, Asst. Reg. Dir., Erika Wodinsky, Gerald E. Wright, June S. Katz, Attys., F.T.C., San Francisco, Cal., for amicus F.T.C. Roger M. Schrimp, Stockton & Schrimp, Modesto, Cal., William P. Torngren, Bolling, Walter & Gawthrop, Sacramento,

Cal., Michael C. Normoyle and Teresa Vig Rein, Damrell, Damrell & Nelson, Modesto, Cal., for defendants-appellees. On Appeal from the United States District Court for the Eastern District of California.

Before MERRILL and GOODWIN, Circuit Judges, and WILLIAMS,[1] Senior District Judge.

MERRILL, Circuit Judge:

Vinod C. Bhan, a nurse anesthetist, appeals from the dismissal of his antitrust suit under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Bhan argues that the district court erred in concluding that he lacked standing to sue under the antitrust laws. He disputes the ruling upon which the district court based its decision, that, as a matter of law accepting the allegations of Bhan's complaint as true, nurse anesthetists and M.D. anesthesiologists do not compete since they do not function in the same market.

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[1] Honorable David W. Williams, Senior United States District Judge, Central District of California, sitting by designation.

I

Bhan is a certified registered nurse anesthetist,[1] who, until April 1983, performed the bulk of his practice at Manteca Hospital in Manteca, California, pursuant to the hospital's contract with Associated Anesthesia Services. That contract expired on March 31, 1983, at which time the hospital allegedly adopted a policy of allowing only M.D. anesthesiologists to perform [772 F.2d 1467, *1468]
services in the hospital's operating rooms. Consequently, appellant claims that he was precluded from practicing his profession at Manteca Hospital.

Bhan filed his complaint on March 28, 1983. He alleged that the hospital's policy violates the federal antitrust laws. He also adduced several state law claims.

Bhan's federal claims are predicated upon Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1985). He alleges that the defendants conspired and combined to eliminate competition in the provision of anesthesia services at the hospital; that they monopolized, attempted to monopolize and conspired to monopolize the provision of those services, and that they formed and maintained a pool of economic and professional power and resources to eliminate competition and exclude nurse anesthetists from the market for anesthesia services at the hospital. In doing so, the defendants allegedly acted with the intent to eliminate competition in the provision of anesthesia services and with the purpose of foreclosing nurse anesthetists from

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[1] A nurse anesthetist is a registered nurse, licensed by the state board of registered nursing, and who has met standards for certification to practice nurse anesthesia set forth by the board. Cal.Bus. & Prof.Code ss 2826(b), 2830 (West.Supp.1985). An M.D. anesthesiologist is a physician who devotes the major part of his practice to the field of anesthesia.

competition; the anticipated result was that monopoly control would be solidified and the costs of anesthesia services would increase. Bhan further contends that as a direct and proximate result of the defendant's conspiracy he has been foreclosed from the market for anesthesia services at Manteca Hospital and the practice of his profession in the Manteca area has been destroyed. He claims that services performed at Manteca Hospital accounted for at least eighty percent of his practice.

Bhan alleges the following acts in support of his claims: In January 1983, defendant Menaugh, the hospital administrator, entered into negotiations with defendant Yong Suk, M.D., to induce Suk to relocate from Michigan to Manteca and to perform anesthesia services at the hospital. Menaugh offered Suk either an exclusive contract with the hospital or the right to determine what services would be provided and by whom. The anticipated arrangement caused concern to Michael Cull, M.D., who was the M.D. anesthesiologist then working at the hospital. Cull contacted either the California Society of Anesthesiologists or the California League of Anesthesiologists to voice his opinion that the hiring of Suk would result in loss of income either to himself or to Bhan or would result in the revocation of his anesthesia privileges. The anesthesiologists' organizations and Suk combined to induce Menaugh to recommend that the hospital board adopt the anesthesiologist-only policy and exclude nurse anesthetists from anesthesia practice. They were allegedly motivated by the fact that nurse anesthetists typically perform anesthesia services at a lower cost and with greater scheduling flexibility than M.D. anesthesiologists, making their services more attractive to consumers.

The defendants moved under Fed.R.Civ.P. 12(b)(6) to dismiss the complaint on the ground that Bhan had not suffered an injury the antitrust laws are designed

to prevent because he does not compete with M.D. anesthesiologists. The district court agreed that California law precluded such competition and,
[772 F.2d 1467, *1469]
therefore, dismissed Bhan's claim for lack of standing to sue under the antitrust laws. Having dismissed Bhan's federal claim, the district court also dismissed his pendent state claims without prejudice.

II

The issue here presented is whether Bhan was a proper party to bring an antitrust action against the defendants. Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1985), provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[1] As the Supreme Court has observed, "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 535 n. 31, 103 S.Ct. 897, 907 n. 31, 74 L.Ed.2d 723 (1983).[2]

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[2] The district court, rather than describing its inquiry as a question of whether the plaintiff is a proper party to bring an antitrust action, phrased its inquiry as an issue of antitrust "standing." What courts have referred to as antitrust standing is, however, subsumed within the inquiry into whether a plaintiff is a proper party to bring an antitrust action. Associated General Contractors, 459 U.S. at 535 n. 31, 103 S.Ct. at 907 n. 31. See also Blue Shield of Virginia v. McCready, 457 U.S. 465, 476, 102 S.Ct. 2540, 2546, 73 L.Ed.2d 149 (1982); Bubar v.

Further, the Supreme Court has stated that in determining whether a party injured by an antitrust violation may recover treble damages, courts should apply the factors set forth in Associated General Contractors rather than making inquiries under such labels as the "zone of interests" or the "target area" test. 459 U.S. at 536 n. 33, 103 S.Ct. at 907 n. 33; *Bubar*, 752 F.2d at 449; *Haff v. Jewelmont Corp.*, 594 F.Supp. 1468, 1473 & n. 3 (N.D.Cal.1984). *See Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1295 (9th Cir.1984), *cert. denied*, --- U.S. ----, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 740-41 (9th Cir.1984), *cert. dismissed*, --- U.S. ----, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985); *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368, 1370 (9th Cir.1983).

In making this determination, "the infinite variety of claims that may arise make it virtually impossible to announce a black letter rule that will dictate the result in every case." *Associated General Contractors*, 459 U.S. at 536, 103 S.Ct. at 908. Instead, "previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 537, 103 S.Ct. at 908.

In evaluating Bhan's complaint, the only Associated General Contractors factor which is at issue is the requirement that the alleged injury be of "the type that the antitrust statute was intended to forestall." [772 F.2d 1467, *1470] *Associated General Contractors*, 459 U.S. at 540, 103 S.Ct. at 910. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 481-84, 102 S.Ct. 2540, 2547,

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Ampco Foods, Inc., 752 F.2d 445, 448-49 (9th Cir.), cert. denied, --- U.S. ----, 105 S.Ct. 3481, 87 L.Ed.2d 616 (1985).

2549-51, 73 L.Ed.2d 149 (1982).[3] As the Supreme Court has stated, "[t]he antitrust laws ... were enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). *See Associated General Contractors*, 459 U.S. at 538-40, 103 S.Ct. at 908-09; *McCready*, 457 U.S. at 482, 102 S.Ct. at 2550.

[2] The requirement that the alleged injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors. *See Associated General Contractors*, 459 U.S. at 538, 539, 103 S.Ct. at 908, 909; *Ostrofe v. H.S. Crocker*, 740 F.2d 739, 744 (9th Cir.1984), *cert. dismissed*, --- U.S. ----, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985); *Haff v. Jewelmont Corp.*, 594 F.Supp. 1468, 1477 (N.D.Cal.1984). Thus, the crux of the matter before the court is whether nurses and physicians are participants in a single anesthesia services market or whether they each participate in their own markets.[4]

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[3] Although the Supreme Court did not explicitly state that a plaintiff must satisfy all of the Associated General Contractors factors or, indeed, any particular factor, the inquiry whether the plaintiff has suffered an injury of the type which the antitrust statute was intended to forestall is a factor of tremendous significance. Not only is the primacy of this requirement "suggested by the manner in which these factors were discussed in Associated General, but it is also suggested by the Court's reasoning in Brunswick and McCready." Haff, 594 F.Supp. at 1476 n. 6.

[4] The State of California, as amicus curiae, puts great weight upon the holding in Ostrofe which allowed a plaintiff to bring suit who was neither a competitor nor a consumer, but was nevertheless a directly injured participant in the relevant market. 740 F.2d at 744-45. In this

[3] In analyzing whether nurse anesthetists and M.D. anesthesiologists participate in the same market, the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between the services provided by nurse anesthetists and by M.D. anesthesiologists. *See Brown Shoe*, 370 U.S. at 325, 82 S.Ct. at 1523; *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir.1975), *cert. denied*, 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982).
[772 F.2d 1467, *1471]

The district court concluded that Bhan could not possibly assert facts which would enable him to establish that he participated in the same market as M.D. anesthesiologists. The court reasoned that the legal restrictions upon nurse anesthetists precluded any reasonable interchangeability of use.[5]

[4] Under California law, in administering anesthesia a nurse must act at the direction of, and under the supervision of, inter alia, a physician. *See Magit v. Board of Medical Examiners*, 57 Cal.2d 74, 83, 17 Cal.Rptr. 488, 491, 366 P.2d 816, 819 (1961); *Chalmers-Francis v. Nelson*, 6 Cal.2d 402, 404-05, 57 P.2d 1312, 1313 (1936); Cal.Bus. & Prof.Code § 2725 (West 1974); 22 Cal.Admin.Code §§ 51326(a)(1),

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case, however, the issue in dispute is not whether Bhan is the type of participant in the relevant market who may maintain an antitrust action, but whether he is a participant in the relevant market at all. Indeed, if the relevant market was found to encompass the services provided both by nurse anesthetists and M.D. anesthesiologists, then Bhan would, as an alternate provider of services and, therefore, a competitor, certainly qualify as the type of participant protected by the antitrust laws. This fact does not, however, obviate the need for determining whether nurse anesthetists and M.D. anesthesiologists participate in the same market.

5 The validity of the legal restrictions upon nurse anesthetists is not being challenged by the appellant.

70235(a); 64 Ops.Cal.Att'y.Gen. 240, 250 (1981).

The requirement of medical supervision does not, however, end the court's inquiry. A nurse anesthetist administering anesthesia under the supervision of a physician may still duplicate many of the services provided by an M.D. anesthesiologist. Further, the supervising physician is not required to be an M.D. anesthesiologist, but might be any attending physician, dentist or podiatrist. See, e.g., 67 Ops.Cal.Atty.Gen. 122 (1984). In defining product markets, courts have recognized that a product should not be excluded from a market because it requires an additional input in order to be a reasonable substitute for other products in the market. *See Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 691 (9th Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976); *Telex Corp. v. International Business Machines*, 510 F.2d 894, 914-19 (10th Cir.), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975). The position of the nurse anesthetist is analogous to that of the competitors in Telex and Calnetics. What differs is only the nature of the input needed. The input required by a nurse anesthetist to match exactly many of the services of an M.D. anesthesiologist is the supervision of an attending physician. Appellant has alleged that such supervision is not only obtainable but is actually a common practice in the medical profession.

No doubt, the legal restrictions upon nurse anesthetists create a functional distinction between nurses and M.D. anesthesiologists. They do not, however, necessarily preclude the existence of a reasonable interchangeability of use or cross-elasticity of demand sufficient to constrain the market power of M.D. anesthesiologists and thereby to affect competition. As a matter of law, Bhan's allegations are sufficient to establish that he is a proper party to bring this antitrust action. Whether Bhan will be able to introduce evidence in support of his allegations or

whether any restrictive arrangements actually proved might survive under the rule of reason are matters which are not before the court.

The decision of the district court is reversed and the case remanded for further proceedings.

**3. *Bhan v. NME Hospitals*, 669 F.Supp. 998 (E.D.Cal. 1987)]**

VINOD C. BHAN, C.R.N.A., Plaintiff,

v.

NME HOSPITALS, INC., a Delaware corporation d/b/a MANTECA HOSPITAL, NATIONAL MEDICAL ENTERPRISES, INC., and JOHN E. MENAUGH, Defendants.

No. CIV S-83-295 LKK.

United States District Court, E.D. California.
Sept. 16, 1987.

Nurse anesthetist brought antitrust action against hospital and anesthesiologist after hospital decided to use only anesthesiologists to provide anesthesia services. On remand from the Court of Appeals, 772 F.2d 1467, the District Court, Karlton, Chief Judge held that: (1) nurse anesthetist had antitrust standing; (2) there was sufficient evidence for jury to find that hospital, anesthesiologist, and others acted in concert toward a common goal; but (3) anesthetist failed to establish that hospital had market power or the relevant market for anesthesia services.

Judgment for defendants.

Timothy E. Morgan, McDermott & Trayner, Pasadena, Cal., H.E. Christian Peeples, Oakland, Cal., Michael I. Spiegel, Spiegel, Cutler, Liao & Kagay, San Francisco, Cal., for plaintiff.

Michael C. Normoyle, Teresa Vig Rein, Damrell, Damrell & Nelson, Modesto, Cal., Robert Fabrikant, McKenna, Conner & Cuneo, Washington, D.C., for

defendants.

KARLTON, Chief Judge.

Plaintiff Vinod C. Bhan ("Bhan") is a certified registered nurse anesthetist ("CRNA") who, in 1983, lost his job at Manteca Hospital after the Hospital decided to implement a policy which permitted only M.D. anesthesiologists to administer anesthesia at the Hospital. He has sued NME Hospitals, Inc., National Medical Enterprises, Inc., John E. Menaugh ("Menaugh"), California Society of Anesthesiologists ("CSA"), California League of Anesthesiologists ("CLA"), and Dr. Young Suk.[1]

Bhan alleges that the decision of the Hospital to permit
[669 F.Supp. 998, *1003]
anesthesiologists to administer anesthesia to patients violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1985). The complaint also alleges a number of pendent state claims. Plaintiff seeks injunctive relief, damages, treble damages, punitive damages, and attorney's fees and costs.

## I

## PROCEDURAL BACKGROUND

Bhan filed his complaint on March 28, 1983, together with an application for Temporary Restraining Order ("TRO"). The proposed TRO sought to compel the Hospital to permit Bhan to perform anesthesia at

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[1] Defendants CSA, CLA, and Dr. Young Suk have been dismissed from the case. The only remaining defendants are NME Hospitals, Inc., National Medical Enterprises, Inc., and John E. Menaugh.

the Hospital. On April 11, 1983, I denied the application for a TRO because Bhan had failed to satisfy the stringent standards for obtaining mandatory relief.

Defendants CSA and CLA brought a motion to dismiss for failure to state a claim. They argued that plaintiff did not have standing to sue under the federal antitrust laws. I granted the motion because in my view, under California law, nurse anesthetists may not, and thus do not, compete with M.D. anesthesiologists in the same market. Accordingly, I held that the decision by the Hospital to exclude nurse anesthetists did not undermine competition, and thus could not implicate the antitrust laws. I concluded that any injury suffered by Bhan was not the type of injury cognizable under the Sherman Act. The Ninth Circuit reversed in *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467 (9th Cir.1985), holding that since Bhan could provide anesthesia under a physician's control and direction, it could not be said that, as a matter of law, Bhan was unable to compete with M.D. anesthesiologists.[2]

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[2] In my unpublished opinion dismissing this case, I noted that although a nurse may administer anesthesia, a nurse can only do so under the supervision of, inter alia, a physician. See Magit v. Bd. of Medical Examiners, 57 Cal.2d 74, 83, 17 Cal.Rptr. 488, 366 P.2d 816 (1961). I found that under such circumstances, by force of California law, anesthesiologists and CRNAs could not compete. I further determined that since California's law arose out of its exercise of its licensing of medical professionals, a matter within the state's police power, it was not preempted. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). I concluded that because CRNAs and M.D.s could not compete, they were not participants in the same market, and, accordingly, plaintiff did not have antitrust standing. See Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). All the above was, of course, reversed by the Ninth Circuit. Drawing upon the observation that "a product should not be excluded from a market because it requires an additional input in order to be a reasonable substitute for other products in the market," Bhan, 772 F.2d at 1471, the court held that the fact that a CRNA must be supervised by a medical

Defendants NME Hospitals, Inc., National
[669 F.Supp 998, *1004]
and John E. Menaugh have now moved for summary judgment on all of plaintiff's claims. After hearing, the motion was taken under submission. By this order, I grant defendants' motion as to the Sherman Act claims, and dismiss the pendent claims.

II

STANDARDS FOR SUMMARY JUDGMENT

In 1986, the Supreme Court addressed the standards for summary judgment in three separate cases: *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Although the Court repeatedly denied that it was altering those standards, I know of no district judge who does not believe that in some fashion his or her duty in reviewing such motions has been altered. Below, I articulate my best understanding of the appropriate method of approaching motions for summary judgment. I also note that summary judgment in the antitrust area has taken on a new complexion.

[1] As the federal rules provide, summary judgment is appropriate when there exists "no genuine issue as to any material fact and ... the moving party is

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doctor did not preclude CRNAs from participating in the same market as anesthesiologists who, as M.D.s, of course require no supervision. Id. I leave to the reader the decision as to whether the issues are analogous. As a district court, I am bound by the circuit's decision, however "misguided." Brown v. Baden, 815 F.2d 575, 576 (9th Cir.1987).

entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985). The moving party bears the initial burden of establishing, through affidavits or otherwise, the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *see T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). The moving party does not necessarily have to put on evidence which negates the opponent's claim. *Celotex*, 106 S.Ct. at 2553. Rather, the moving party may prevail by simply pointing out "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 2553.

[2] When the moving party has identified portions of the record which demonstrate the absence of a genuine issue of material fact, and the opposing party will have the burden of proof as to that fact at trial, the opposing party has an obligation to produce evidence showing that the fact is in dispute. *Celotex*, 106 S.Ct. at 2552-53. If the opposing party fails to make the requisite showing, the court must enter judgment in favor of the moving party. *Id.*

In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

*Celotex*, 106 S.Ct. at 2553.

[3] In attempting to establish the existence of this factual dispute, the opposing party may not rely upon

the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits or admissible discovery material which support its contention that the dispute exists. See Fed.R.Civ.P. 56(e); *Strong v. France*, 474 F.2d 747, 749 (9th
[669 F.Supp. 998, *1005]
Cir.1973).

[4] In resolving the summary judgment motion, the court examines "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Fed.R.Civ.P. 56(c). Of course, it is the obligation of the parties to direct the court to the place in the record where evidence of the facts might be found. All reasonable inferences which may be drawn from the facts before the court must be drawn in favor of the party opposing the motion, in this case plaintiff. See *Matsushita*, 106 S.Ct. at 1356-57. Nevertheless, inferences are not drawn from the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244 (E.D.Cal.1985), *aff'd*, 810 F.2d 898 (9th Cir.1987). [5] I have previously noted a rhetorical reluctance to grant summary judgment in antitrust cases, which I suggested made no difference in the way courts actually resolved such motions. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F.Supp. 1504, 1507 (E.D.Cal.1983). It is my view that the Supreme Court has completely shifted the premise, and now seeks to encourage the summary disposition of antitrust litigation. Traditionally it has been said that the opposing party must demonstrate that the disputed fact is material, i.e., that it makes a difference in the litigation, and that the dispute is genuine. *T.W. Elec. Service*, 809 F.2d at 630. The opposing party need not establish the material issue of fact conclusively in its favor. *Id.* It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve

the parties' differing versions of the truth at trial." *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

In *Matsushita*, however, the Court explained with respect to a section 1 claim that:

To survive [the] motion for summary judgment, [plaintiffs] must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury.... This showing has two components. First, [plaintiffs] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct.... Second, the issue must be "genuine." ... When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita*, 106 S.Ct. at 1355-56 (footnotes and citations omitted). The Court also said that "if the claim is one that simply makes no economic sense [,] [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 1356. The Court has also altered the method of handling inferences concerning the existence of a conspiracy. The Court now teaches, at least with respect to parallel conduct cases, that:

conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.... To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.... [Plaintiffs] in this case, in other words, must show that

[669 F.Supp. 998, *1005]

the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive

action that could not have harmed [plaintiffs]. *Id.* at 1357 (citations omitted).[3]

## III

## UNDISPUTED FACTS

The following facts are not genuinely in dispute:

A. Manteca Hospital

Manteca Hospital is a 49-bed acute care hospital located in Manteca, California, and is owned by NME Hospitals, Inc. A number of individuals and committees contribute to the decision-making process at the Hospital, including an administrator, a Governing Board, an Executive Committee, and a variety of medical staff committees. The granting and review of clinical privileges at Manteca Hospital are governed by the Hospital's bylaws, with ultimate authority over privileges and staff membership resting with the Governing Board.

B. The Market for Medical Services

1. Hospitals in the Area

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[3] The approach taken by the Supreme Court seems to distinguish the handling of inferences in antitrust cases from all others. Such a distinction cannot be justified since a single federal rule governs all summary judgment. It may be, however, that the Court is inartfully making the point that where defendants have legitimate business reasons for the conduct complained of, proof of the conduct, vel non, even if parallel, is insufficient to provide a factual premise for an inference of unlawful conduct. See Nielsen Freight Lines, 602 F.Supp. at 1244-45.

There are a number of hospitals located within 30 miles or 30 minutes of Manteca Hospital, including San Joaquin General Hospital (16 miles/20 minutes), Doctors Medical Center--Modesto (16 miles/22 minutes), Tracy Community Hospital (16 miles/22 minutes), St. Joseph's Hospital--Stockton (16 miles/30 minutes), and Dameron Hospital--Stockton (17.25 miles/35 minutes). In addition, there are other hospitals close to Manteca Hospital, including Memorial Hospital, Modesto City Hospital, and Scenic General Hospital in Modesto; Memorial Hospital South in Ceres; and Oak Valley District Hospital in Oakdale. It is generally accepted in the health industry and uncontested in this case that hospitals within 30 minutes traveling time of each other are in competition with one another.

2. Health Facilities Planning Area 507

Manteca Hospital is included along with four other hospitals (Dameron, San Joaquin General, St. Joseph's Hospital--Stockton, and St. Joseph's Oak Park) in a state-designated health planning district called Health Facilities Planning Area ("HFPA") 507. The planning district was established by the California Office of Statewide Health Planning and Development. According to the 1983 annual report, the 49 acute care beds available at Manteca Hospital represented only a 6.3 percent share of the 733 acute care beds that were available in HFPA 507. Forty (40) of the acute care beds at Manteca Hospital were licensed medical/surgical beds. According to the report, those 40 beds represented a 7.3 percent share of the 548 licensed medical/surgical beds available in HFPA 507. In 1983, Manteca accounted for 8,610 patient days for medical/surgical
[669 F.Supp. 998, *1006]
procedures. In 1983, San Joaquin General, St. Joseph's, and Dameron had a combined total of 465

medical/surgical beds available, and accounted for a total of 118,045 patient days for medical/surgical services. Anesthesia is largely administered in conjunction with medical/surgical services.

3. Patients Who Live Near Manteca Hospital

Many of the patients who live in close proximity to Manteca Hospital elect to go to hospitals other than Manteca when in need of medical services. In 1983, 78.2 percent of the total admissions at Manteca Hospital came from the geographic area represented by ZIP code area 95336. Yet nearly 60 percent (58.2%) of patients who lived in that area used hospitals other than Manteca Hospital. An expert reported that some of the patients from the ZIP code area may have gone to other hospitals because the procedures they wanted were not available at Manteca Hospital. Nonetheless, a 1980 patient origin study conducted under the auspices of the North San Joaquin Valley Health Systems shows that more than 50 percent of the patients from that area chose to have procedures performed at hospitals other than Manteca, even though the same procedures were available at Manteca.

C. The Distribution of Surgeons in the Area

Most, if not all, physicians who have staff privileges at Manteca Hospital also have privileges at other hospitals in the area. Between 1979 and 1983, nearly all doctors who maintained medical staff privileges at Manteca Hospital, including "close to 100%" of the surgeons at the Hospital, had staff privileges at nearby hospitals in Stockton and Modesto. Many of the doctors who work at Manteca Hospital arrange for "coverage" by doctors based outside of Manteca, most commonly in Tracy, Stockton or Modesto.

D. The Distribution of Anesthesia Providers

Some hospitals in the area do not use CRNAs to provide anesthesia services. However, at least one hospital (San Joaquin General), and possibly two others (Modesto City and Oakdale), in the area utilizes the services of CRNAs. In addition, physicians who provide surgery on an outpatient basis in their offices use nurse anesthetists. There is no evidence to suggest the distribution of M.D. anesthesiologists in the area, or the ratio between nurse anesthetists and M.D. anesthesiologists.

E. The AAS Contract With the Hospital

AAS was a business entity which provided hospitals with anesthesia services, including billing, the coordination of anesthesia schedules and coverage, and the supplying of anesthesia providers. Sometime in the Fall of 1979, Manteca Hospital entered into an oral contract with AAS, whereby AAS agreed to provide anesthesia services at the Hospital. Under the contract, AAS supplied the Hospital with nurse anesthetists and M.D. anesthesiologists, and was responsible for all billing and collection activity. Manteca Hospital had no involvement in billing the anesthesia services provided under the AAS contract. On April 1, 1981, Manteca and AAS entered into a written contract for the provision of anesthesia services. Pursuant to the 1981 written agreement, AAS was to continue supplying the Hospital with both M.D. anesthesiologists and nurse anesthetists.

F. Bhan's Employment at Manteca Hospital

Plaintiff Bhan is a CRNA who moved to California in 1979. Before he started working at Manteca Hospital, he worked as a nurse anesthetist at a number

of other hospitals in the Central Valley. In the Spring of 1979, [669 F.Supp. 998, *1007]
to an advertisement placed by AAS soliciting the services of nurse anesthetists and M.D. anesthesiologists, and was referred by AAS to Manteca Hospital. Plaintiff began his work at the Hospital as a nurse anesthetist in either August or September of that year. In December 1979, Bhan entered into a written contract with AAS to provide anesthesia coverage for AAS clients. The contract provided that AAS would pay Bhan a guaranteed monthly retainer of $2,500.

Bhan worked primarily at Manteca Hospital from 1979 to 1983. However, he also worked during those years at other hospitals in Sanger, Reedley, Dinuba, Dos Palos, Patterson, Oakdale, Vallejo, and Antioch, and at family planning clinics operated by Family Planning Associates Medical Group. Bhan's position at Manteca Hospital was terminated when the AAS contract expired in March 1983. During the period of time he had provided anesthesia services at the Hospital, Bhan performed competently.

G. The Decision Not to Renew the AAS Contract

Before the AAS contract expired on March 31, 1983, the Hospital had decided not to renew it. In its place, the Hospital instituted a policy which permitted only M.D. anesthesiologists to provide anesthesia services at the Hospital, thereby excluding nurse anesthetists. The parties disagree about why the Hospital made that decision. Nonetheless, there appear to be a number of facts that are not substantially in dispute.

In meeting its contractual obligation to furnish anesthesia services between 1979 and 1983, AAS referred to the Hospital both M.D. anesthesiologists and Bhan, the nurse anesthetist. A number of surgeons and

administrators felt that the services provided by AAS were not satisfactory. There was frequent turnover of the M.D. anesthesiologists supplied by AAS. Often there would be a different M.D. anesthesiologist each week, and sometimes each day. Sometimes there would be no M.D. anesthesiologist, and the nurse anesthetist would provide all the anesthesia services. Few of the M.D. anesthesiologists stayed at the Hospital longer than a month or two.

Another problem perceived by the surgeons was the lack of 24-hour coverage by M.D. anesthesiologists. Surgeons were concerned that where an M.D. anesthesiologist was not available for a particular surgery, the surgeon would be held legally accountable for the actions of the nurse anesthetist. This belief was founded in part on the fact that the surgeon had to "sign-off" on the anesthesia record of the nurse anesthetist after the completion of surgery. See n. 2, supra. Some surgeons also believed that a nurse anesthetist was not competent to perform anesthesia in certain cases. The Hospital decided that it had to take steps to reduce the turnover problems and to ensure 24-hour coverage by an M.D. anesthesiologist. Menaugh discussed possible alternatives with several M.D. anesthesiologists in the area. In this regard, Menaugh had extensive discussions with Dr. Edward Kimm, an M.D. anesthesiologist who worked in Modesto. In May 1982, Dr. Kim introduced Dr. Young Suk, another M.D. anesthesiologist, to Menaugh, and Menaugh interviewed Dr. Suk for a position as an anesthesiologist at the Hospital. The negotiations broke down, and Dr. Young Suk subsequently went to work for Dr. Edward Kimm at Doctors Medical Center.

In June 1982, Menaugh met with Mr. Buznic, an official with AAS, to discuss the provision of anesthesia services under the AAS contract. At that meeting, Menaugh and Buznic discussed whether AAS could provide 24-hour

[669 F.Supp. 998, *1008]
M.D. anesthesiologist. Buznic rejected the suggestion that AAS supply a second M.D. anesthesiologist because he felt that the volume of work at the Hospital would not support a third anesthesia provider. Instead, Buznic suggested that the Hospital replace the M.D. anesthesiologist who was working there at that time with another M.D. anesthesiologist, Dr. Michael Cull. In August 1982, Dr. Cull entered into a contract with AAS to provide anesthesia services to clients of AAS, and the Hospital granted provisional staff privileges to Dr. Cull the following month.

In January 1983, Menaugh reported to the Governing Board that he had decided that the AAS contract should not be renewed. Sometime after that decision, Bhan was informed that his employment at the Hospital would end upon the expiration of the contract. In addition, Menaugh informed Dr. Cull that, because he was an employee of AAS, Dr. Cull would not be permitted to work at the Hospital after the AAS contract expired. Shortly thereafter, Dr. Cull retained an attorney to challenge the Hospital's right to terminate his privileges at the Hospital. Menaugh reconsidered his decision to terminate staff privileges of Dr. Cull, and decided that Dr. Cull could continue to work at the Hospital after the expiration of the AAS contract. At about the same time Menaugh decided that the AAS contract should not be renewed after its expiration, he learned that Dr. Young Suk had left Dr. Kimm's group in Modesto, and was interested in discussing the possibility of working at Manteca. In February 1983, the Hospital extended an invitation to Dr. Suk to work at the Hospital. Dr. Suk accepted the invitation. On February 24, 1983, the Surgery Committee met to consider the alternatives available to the Hospital after the AAS contract expired, and to formulate their recommendation for the Hospital's Medical Staff Executive Committee. Bhan and Dr. Cull

attended the meeting. The Surgery Committee minutes of that meeting show that the following concerns were raised: the surgeons were afraid that they would be held legally accountable for the actions of the nurse anesthetists; surgeons did not feel they could interrupt a surgery to supervise a nurse anesthetist and, in any event, did not feel qualified to intervene; the surgeons believed that only M.D. anesthesiologists receive the training necessary to handle the range of possible complications during anesthesia; and, it was not practical to have an M.D. anesthesiologist supervise nurse anesthetists at all times.

After hearing comments from Bhan and Dr. Cull, the Surgery Committee decided to recommend that the Hospital adopt a policy restricting the provision of anesthesia services to M.D. anesthesiologists. There is no direct evidence that the surgeons discussed the economic benefits that would be enjoyed by the M.D. anesthesiologists by virtue of this decision.[4] No M.D. anesthesiologist participated in the decision to recommend an M.D. anesthesiologist-only policy.

The recommendation of the Surgery Committee was forwarded to the Manteca Hospital Executive Committee. The Executive Committee met on March 1, [669 F.Supp. 998, *1009]
discuss the recommendation. Bhan attended the Executive Committee meeting, but there is no indication that Dr. Cull attended the meeting. After consideration of the various issues raised by the Surgery Committee, the Executive Committee accepted the recommendation to adopt a policy of permitting only

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[4] Plaintiff provided the court with an incomplete transcript of a purported tape recording of the meeting. The transcript is composed of fragments of conversation and, as a result, is virtually indecipherable. Accordingly, I give it no weight here.

M.D. anesthesiologists to administer anesthesia at the Hospital. No M.D. anesthesiologists participated in the decision to accept the Surgery Committee's recommendation.

At a monthly meeting on March 22, 1983, the Governing Board took up the Executive Committee's proposal. After considering the various aspects of the recommendation, and hearing comment from Bhan, the Board adopted the policy recommended by the Surgery Committee and the Executive Committee. There were no M.D. anesthesiologists present at the Governing Board meeting. H. The Effect Of The Decision On Bhan's Livelihood

Menaugh notified Bhan by letter of March 29, 1983, that due to the decision of the Governing Board, Bhan would no longer be permitted to work at the Hospital after March 31, 1983. After the termination of his relationship with Manteca Hospital, Bhan immediately began to look for other employment arrangements. In early April 1983, Bhan signed an agreement with Worldwide Anesthesia Associates ("Worldwide") whereby Worldwide agreed to pay $2,800 a month for each month that Bhan worked for Worldwide. Bhan decided not to go forward with that contract because he felt that it would cause his family hardship. Bhan eventually went to work at other hospitals and clinics. He testified that as a result of his new working arrangements, he had to travel extensively, his wife had to return to work, he was away from home more, his children did not do as well in school, and he lost his friends at Manteca Hospital. Sometimes Bhan was away from home three weeks a month. Bhan testified that his reputation was damaged because he was not able to work with people he used to work with, and that he does not know what the people at Manteca Hospital think about him.

Although Bhan feels that he "lost what [he] had" at Manteca Hospital, there is no evidence showing the

extent of monetary damage Bhan suffered as a result of his termination. In fact, Bhan's tax records show that his gross income has dramatically increased since he left the Hospital. According to his tax records, Bhan received in gross income the following amounts between 1979 and 1985: 1979--$15,862; 1980--$40,640; 1981--$48,090; 1982--$48,238; 1983--$53,340; 1984--$68,356; and 1985--$96,074. Bhan testified that he expected to make at least $95,074 during 1986, and that he would probably make more. Bhan has produced no records showing what portion of his gross income from 1979 to 1983 came from his employment at Manteca Hospital. However, Bhan has stated that approximately 80% of his income during those years was derived from the services he rendered at Manteca Hospital.

I. The Division of Anesthesia Services After The Decision

After the decision of the Governing Board, Dr. Young Suk joined Dr. Cull as the second M.D. anesthesiologist. After some initial disagreement, Dr. Cull and Dr. Suk agreed to divide the work equally between them. Under the agreement, each would work four days a week and each was responsible for alternate weekends.

J. The Effect Of The Decision On Anesthesia Rates and Services

During the period of time the AAS contract was in effect, AAS set the rates to be charged for anesthesia services. The rates set by AAS for the services [669 F.Supp. 998, *1010]
M.D. anesthesiologists were generally higher than the rates charged for the services of M.D. anesthesiologists at other hospitals in the area. There were some bills that charged out at a rate of $38 a unit when other

hospitals in the area were charging a high of $34 a unit. Moreover, the only evidence before the court shows that, at least in some cases, the rates billed out for Bhan and Dr. Cull were equivalent. Bhan has testified he has no evidence that the rate which AAS charged for his work was ever lower than the rate charged for the services of an M.D. anesthesiologist. In fact, Bhan does not know what AAS was billing out for his services. After the expiration of the AAS contract, the cost of anesthesia services at Manteca Hospital dropped.

## IV

## JURISDICTION

[6] The Sherman Act prohibits conspiracies "in restraint of trade or commerce among the several states," 15 U.S.C. § 1, and also prohibits monopolizing "any part of the trade or commerce among the several states." 15 U.S.C. § 2.[5] It has been said that the Act "defines both the conduct proscribed by the statute and its jurisdictional reach." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1096 (9th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980). The jurisdictional reach of the Sherman Act is broad, and generally coextensive with Congressional authority under the Commerce Clause. *See McLain v. Real Estate Bd.*, 444 U.S. 232, 241, 100 S.Ct. 502, 508, 62 L.Ed.2d 441 (1980). Accordingly, a plaintiff may establish federal jurisdiction under the Act upon a showing that "defendants' activity is itself

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[5] Section 1 provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *Id.* at 242, 100 S.Ct. at 509.

Section 2 provides in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

A number of circuits have held that it is the unlawful conduct itself that must occur in or affect interstate commerce. *See, e.g., Stone v. William Beaumont Hospital*, 782 F.2d 609, 614 (6th Cir.1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir.1985). This interpretation would appear to be consistent with the language of the statute. In *McLain*, however, the Supreme Court indicated that it is the general business activities of a defendant, and not the challenged conduct, that is the focus of the jurisdictional inquiry. *McLain*, 444 U.S. at 242-43, 100 S.Ct. at 509. The Court reasoned that: If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect.

*Id.* at 243, 100 S.Ct. at 509.

[669 F.Supp. 998, *1011]

[7] Relying upon *McLain*, the Ninth Circuit has held that to establish jurisdiction it is "not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as defendants' business activities, independent of the violations, affected interstate commerce." *Western Waste Service*, 616 F.2d at 1097. Irrespective of the positions taken by the other circuits, I am, of course, bound by the Ninth Circuit's view. Accordingly, to establish jurisdiction in the Ninth Circuit, Bhan need

only show that the Hospital's general business activities are "in commerce." *See also Hahn v. Oregon Physicians Service*, 689 F.2d 840, 844 (9th Cir.1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3115, 77 L.Ed.2d 1369 (1983). [8] The plaintiff alleges in his complaint both that the general business activities of the Hospital are in interstate commerce and that they affect interstate commerce. In particular, plaintiff alleges that the chemicals, equipment, and supplies used to provide anesthesia services at the Hospital were purchased and shipped in interstate commerce. In addition, plaintiff alleges that a substantial portion of the cost for anesthesia services is paid for by Medicare and by "nation-wide and inter-state" insurance carriers. Finally, defendants NME Hospitals, Inc. and National Medical Enterprises, Inc. are out-of-state corporations.

Defendants take the position that alleged unlawful conduct must be in or affect commerce, and, as a result, do not produce any evidence which suggests that either the Hospital's business activities in general, or the anesthesia services in particular, are not in commerce. Because defendants have failed to produce evidence which shows that their general activities are not in interstate commerce, the question is resolved by examination of the pleadings. *See Thornhill Publishing Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.1979). I conclude that plaintiff has sufficiently alleged a jurisdictional basis for this action.

V

THE 15 U.S.C. SECTION 15(a) CLAIM

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), grants a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The injured party may sue to "recover threefold the damages by

him sustained, and the cost of suit, including a reasonable attorney's fee." *Id.*

The language of section 15(a) is as straightforward as it is broad. Taken literally, it would encompass any injury to a person's business or property caused by an antitrust violation. Based on the terms of the statute, a plaintiff would need to prove only two things to prevail on a section 15(a) claim: (1) that he was injured in his business or property; and (2) that the injury was the result of an antitrust violation. I have previously traced the courts' rude treatment of the statute's language, and the narrowing of liability through development of the notion of "antitrust standing." *See Sacramento Valley Chapter of the Nat'l Elec. Contractors Ass'n (NECA) v. Int'l Bhd. of Elec. Contractors (IBEW)*, 632 F.Supp. at 1403, 1406-10 (E.D.Cal.1986). [1] As noted in *NECA*, at 1407 n. 5, "antitrust standing" is not to be confused with constitutional standing. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."
[669 F.Supp. 998, *1012]

*Associated Gen. Contractors v. California State Council of Carpenters ("AGC")*, 459 U.S. 519, 535 n. 31, 103 S.Ct. 897, 907 n. 31, 74 L.Ed.2d 723.

Presumably to avoid the inevitable confusion between "antitrust standing" and "constitutional standing," the Ninth Circuit has abandoned the "antitrust standing" label and has, instead, simply

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[1] Obviously, a person may suffer harm unrelated to his or her business or property. The Supreme Court thus overstated the case when it declared that a literal interpretation of the statute would "encompass every harm" attributable to an antitrust violation. See Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 529, 103 S.Ct. 897, 904, 74 L.Ed.2d 723 (1983) (emphasis added).

characterized the issue as being whether a given plaintiff is a proper party to bring an antitrust action against a defendant. *See Lucas v. Bechtel Corp.*, 800 F.2d 839, 843 & n. 6 (9th Cir.1986); *Bhan*, 772 F.2d at 1469-70 n. 2 (9th Cir.1985).[2] However characterized, the question of whether a plaintiff can sue under the antitrust laws is a preliminary issue that must be resolved before the substantive elements of an antitrust claim can be addressed.

A. Antitrust Standing/Proper Party Determination

[9] Because the Supreme Court has sought to apply common law notions of duty to the issue of antitrust standing, no bright line rule can provide a clear answer in every case as to whether a particular party may sue. *See NECA*, 632 F.Supp. at 1409. "Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *AGC*, 459 U.S. at 536-37, 103 S.Ct. at 908. Those factors include: (1) the nature of the plaintiff's injury, (2) the directness of the injury, (3) the speculative nature of the harm, and (4) avoiding the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other. *AGC*, 459 U.S. at 538-44, 103 S.Ct. at 908-911; *Lucas*, 800 F.2d at 844. The foregoing list of factors is non-exclusive, and the Supreme Court has not said that a plaintiff must "satisfy all of the ... factors or, indeed, any particular factor." *Bhan*, 772 F.2d at 1470 n. 3.

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[2] I have expressed my opinion that since "[a]ntitrust violations are essentially tortious acts," and that "[a]n element of any action in tort is an allegation that the defendant owed a duty to the plaintiff," it is unclear why "questions of the existence of duty in antitrust cases have been denominated questions of 'antitrust standing,' rather than simply questions of duty." NECA, 632 F.Supp. at 1407 (footnote omitted).

1. Nature of the Injury

[10] The Sherman Act was enacted to assure competition in the marketplace by "protecting the economic freedom of participants in the relevant market," *AGC*, 459 U.S. at 538, 103 S.Ct. 908, and is thus said to protect only against injury sustained as a result of anticompetitive activities. *See id*; *Lucas*, 800 F.2d at 844. Accordingly, only a plaintiff who has suffered an antitrust injury, i.e., an injury of the type that antitrust laws were intended to protect against, may sue. *Lucas*, 800 F.2d at 844.
[669 F.Supp. 998, *1012]

[11] There are evidently two aspects to ascertaining whether a plaintiff has suffered an antitrust injury.[3] First, the injured party must "participa[te] in the same market as the alleged malefactors," either as a competitor or a consumer. *Lucas*, 800 F.2d at 844. The Ninth Circuit has already ruled that Bhan was a participant in the same market as M.D. anesthesiologists, and thus he has satisfied this aspect of the test. This holding is, of course, the law of the case and, accordingly, I need not further address that issue here.

[12][13] The second issue is whether plaintiff has suffered injury in his business or property. See 15

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[3] The means chosen by the Supreme Court to distinguish persons who may sue from those who may not "has not been a particularly successful technique for providing guidance to the lower courts who must apply the law on a day-to-day basis." NECA, 632 F.Supp. at 1409 n. 13. In like manner, because the line of demarcation between the issue of standing and the merits is, to say the least, imprecise, it is not altogether clear what aspects of causation are to be resolved at the preliminary stage and what aspects are to be resolved at trial. Compare Lucas, 800 F.2d at 844 (causation a standing problem), with William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014, 1051 (9th Cir.1981), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982) (causation a merits question).

U.S.C. § 15(a). The term "business" as used in the statute refers to "that which occupies the time, attention and labor of [persons] for the purpose of ... pecuniary reward." *Fine v. Barry and Enright Productions*, 731 F.2d 1394, 1397 (9th Cir.), *cert. denied*, 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984). The word 'property' comprehends anything of material value owned or possessed," including money. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979). The property need not be related to a business, and a business need not be related to property. *See id.* at 339, 99 S.Ct. at 2331. Personal injuries are not compensable under the Sherman Act. *Id.*

[14][15] There can be no doubt that Bhan's work at the Hospital was a business for antitrust purposes, and that the decision of the Hospital to permit only M.D. anesthesiologists to provide anesthesia services at the Hospital caused injury to that business. In fact, the decision of the Hospital destroyed the business. Given the Ninth Circuit's determination that M.D. anesthesiologists and CRNAs participate in the same market, Bhan's loss of his business is exactly the kind of injury that the antitrust laws were designed to forestall. [16][17] Bhan also suffered a number of injuries unrelated to his business or property. As a result of the termination, Bhan alleges that his wife had to get a job and the school work of his children deteriorated. These injuries, if compensable, are suffered by Bhan's wife and children, and Bhan has no standing in the constitutional sense to bring an action for those events. He also alleges that he lost his friends at the Hospital, and that his reputation at the Hospital was marred. These are personal injuries that are simply not compensable under the antitrust laws. Bhan may not sue to recover for losses unrelated to his business or property under the Sherman Act.

2. Directness of the Injury

A second factor to be considered in evaluating whether [669 F.Supp. 998] *1013) antitrust standing is whether the injury claimed is direct or indirect. *AGC*, 459 U.S. at 540, 103 S.Ct. at 909. Although the inquiry into whether an injury is direct or indirect is largely "unquantifiable," this factor can be "most easily measured by the presence of others more immediately harmed who could bring the action." *NECA*, 632 F.Supp. at 1409[4] Accordingly, the court must take into consideration whether there is a more immediate victim of the illegal conduct. *See AGC*, 459 U.S. at 541-42, 103 S.Ct. at 910.

[18][19] The injuries suffered by competitors as the result of anticompetitive conduct are generally considered direct, since they tend to flow immediately from the unlawful conduct and not from the injuries sustained by someone else. *See Lucas*, 800 F.2d at 844-45. The Ninth Circuit has already determined that, as a nurse anesthetist, Bhan is in competition with M.D. anesthesiologists. While it may be argued that consumers are as directly harmed as competitors by anticompetitive activity, competitors are, of course, within the class of those who may bring an antitrust action. *See id.* I conclude that Bhan's injuries are a direct result of the alleged unlawful conduct.

3. Speculative Nature of the Damages

[20] Section 15(a) authorizes persons who have been injured to bring suit. The statute does not make

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[4] The word "direct" has been defined as "proceeding from one point to another in time or space without deviation or interruption." Webster's Third New Int'l Dictionary 640 (1976). The word "indirect" has been defined as "not direct; ... deviating from a direct line or course: not proceeding straight from one point to another." Id. at 1151.

the existence of damages a prerequisite to bringing an action. Nonetheless, a third factor to consider in determining whether a plaintiff can bring suit is whether the damages allegedly sustained by plaintiff are speculative. *See AGC*, 459 U.S. at 542, 103 S.Ct. at 911; *cf. Lucas*, 800 F.2d at 844 (question is whether measure of "harm" is speculative).[5]

[21] Antitrust damages may be speculative in one of two ways. First, the existence or fact of damages may be speculative. The existence of damages is speculative when there is a serious question as to whether a plaintiff suffered any monetary loss as the result of the unlawful conduct. Second, the amount of damages may be speculative. The amount of damages is speculative when, although it is clear that a plaintiff suffered some loss, plaintiff is unable to provide any measure of the extent [669 F.Supp. 998, *1014] *Zenith Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969); *Ronwin v. State Bar*, 686 F.2d 692, 700 (9th Cir.1981); *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097, 1102 (9th Cir.1979).

[22] In proving that he is a proper party to bring the action, the plaintiff need only show that the existence or fact of damage is not speculative, i.e., that he has suffered some damage. *See Catalano*, 686 F.2d at 1102. The plaintiff need not prove the extent of his

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5 The Supreme Court decision in AGC tends to blur the distinction between injury and damage. A person is "injured" when a legally protected interest is invaded by another. See Restatement (Second) of Torts s 7 (1965). "Damages" refers to the monetary compensation recoverable by a person who has been injured, that is, the "sum of money awarded to a person injured by the tort of another." Restatement (Second) of Torts s 12A (1965). It is true, of course, that treble damages are not recoverable under the Clayton Act unless actual damages are ascertainable, see 15 U.S.C. s 15(a), but this is not the same thing as saying that a person cannot sue unless he has suffered ascertainable damages.

damages. Id. As the Supreme Court explained in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931), "[t]he rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Accord William Inglis*, 668 F.2d at 1051. So long as the plaintiff shows that he has suffered some actual damage, the plaintiff can bring suit and is entitled to nominal damages, even if the amount of damages is not ascertainable. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1350 (9th Cir.1986); *First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1176 (9th Cir.), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980).

Bhan has demonstrated without a doubt that he suffered actual damages as a result of the alleged conspiracy of the defendants. The conduct in issue destroyed Bhan's business at Manteca Hospital, causing him to lose all that he would have made at the Hospital absent the decision to prohibit nurse anesthetists from providing anesthesia. The fact that Bhan was able to mitigate his damages by successfully creating another business does not negate the fact that he sustained damages. Indeed, the principle of mitigation of damages presumes that there are damages to mitigate. To provide an antitrust violator immunity from suit simply because the victim successfully mitigates his damages would undermine the antitrust laws' broad goal of restraining anticompetitive conduct.

4. Complexity of the Litigation

The Court explained in *AGC* that there is an interest "in keeping the scope of complex antitrust trials within judicially manageable limits." 459 U.S. at 543, 103 S.Ct. at 911. A final consideration, therefore,

is whether by permitting a particular plaintiff to bring an action under the antitrust laws, the court is running "the risk of duplicate recoveries on the one hand, or ... of complex apportionment of damages on the other." *Id.* at 543-44, 103 S.Ct. at 911.

Despite appearances, this is not a complex case, and it appears that only Bhan and those consumers who would have preferred using his services at Manteca Hospital have been injured by the actions of defendants. Consequently, there is not much chance that permitting Bhan to sue runs the risk of duplicate recoveries or complex apportionment of damages. [669 F.Supp. 998, *1015]

[23] I conclude that, given the law of the case, the nature and directness of plaintiff's injury, the nature of the damages, and the complexity of the case, Bhan has the right to sue under the antitrust laws.

B. Substantive Antitrust Violations

Having determined that Bhan may bring this action, the next question is whether the injuries to Bhan were caused by defendants' violations of the antitrust laws. Bhan has alleged that defendants' conduct violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. I begin with his section 1 claim. 1. Section 1 Violation

To prevail on a section 1 claim, Bhan must show (1) that there was a contract, combination, or conspiracy; (2) that the contract, combination, or conspiracy unreasonably restrained trade or commerce; and (3) that the restraint affected interstate commerce. See 15 U.S.C. § 1; *T.W. Elec. Service*, 809 F.2d at 632-33. I have already concluded that the Hospital's

activities affect interstate commerce.[6] Accordingly, I now address whether defendants contracted, combined, or conspired together and, if so, whether that joint conduct caused a restraint of trade.

a. Contract, Combination, or Conspiracy

[24][25][26] A "contract, combination, or conspiracy" under the antitrust laws may be defined as concerted action intended to achieve a common goal. *See T.W. Elec. Service*, 809 F.2d at 632-33. To establish a conspiracy, a plaintiff must present "direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Wilcox v. First Interstate Bank*, 815 F.2d 522, 525 (9th Cir.1987) (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984)). Although a conspiracy cannot be inferred from parallel conduct absent an inquiry into the motivation of the alleged conspirators, proof of motivation is not required when there exists either direct evidence of collaboration or other probative circumstantial evidence (beyond evidence of mere parallel conduct) from which to infer an agreement. *See Wilson Indus., Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1365 (9th Cir.1986); VI P. Areeda, Antitrust Law PP 1412a, 1425b.[7] In

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[6] As noted in section IV, supra, the jurisdictional inquiry is coextensive with the substantive requirements of the Sherman Act.

[7] Motivation plays a multifaceted role in proving an antitrust violation. In addition to forming a basis for inferring a conspiracy when presented in the context of parallel conduct, motive may also be relevant in showing that conduct unreasonably restrained trade. See, e.g., Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1372 (9th Cir.1983) (acting with anticompetitive purpose may suffice to

establishing that defendants acted jointly to achieve a common goal, plaintiffs must of course identify who the alleged conspirators are and what the alleged conspiracy was to accomplish. *See T.W. Elec. Service*, 809 F.2d at 633.

Bhan claims that the two M.D. anesthesiologists (Dr. Suk and Dr. Cull) and the Hospital Administrator (John Menaugh) conspired with members of the Surgery Committee (Drs. Stoops, Lin, Williams, Espiritu, and Barr) and others to protect the income of the two M.D. anesthesiologists by pressuring the Hospital to adopt a policy permitting only M.D. anesthesiologists to provide anesthesia services at the Hospital. This policy resulted in the exclusion of all CRNAs, including Bhan, from practice at the Hospital. [27] I begin by noting that this is not a "parallel conduct" case. On the contrary, the defendants freely acknowledge that the action which forms the gravamen of the suit was the result of a series of decisions made after consultations and deliberation. The only question is whether there is evidence sufficient to infer wrongful conduct. Under the evidence before the court, I cannot say that a jury could not reasonably infer that defendants Menaugh and the Hospital, through the Governing Board, acted in concert with others toward a common goal, that is to replace CRNAs with M.D. anesthesiologists. Menaugh actively participated at every stage of the decision-making process which ultimately resulted in the exclusion of the CRNAs. He had a number of

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permit presumption of anticompetitive effect under "per se" analysis); Betaseed, Inc. v. U and I, Inc., 681 F.2d 1203, 1228 (9th Cir.1982) (for "rule of reason" purposes court is to examine intent of defendants as well as anticompetitive effect). Some authorities have criticized any inquiry into the state of mind of a defendant to prove a restraint of trade because, in their view, the actual intention of a defendant seldom determines whether a particular restraint is unreasonable. See, e.g., VII P. Areeda, Antitrust Law P 1506, at 389 (1986).

discussions with the two M.D. anesthesiologists at the Hospital and with the surgeons, alleged co-conspirators, about anesthesia services at the Hospital. In January 1983, Menaugh reported to the Governing Board that the AAS contract should not be renewed, and ultimately made the decision to terminate Bhan's employment at the Hospital upon expiration of the contract. He attended the Surgery Committee meeting of February 1983, during which members of the Committee, other alleged co-conspirators, discussed the basis for the decision to adopt an M.D. anesthesiologist-only policy. Menaugh actively discussed the basis for the policy during both the Executive Committee meeting and the meeting of the Governing Board. The Governing Board made the ultimate decision to exclude CRNAs. The evidence taken together raises a genuine issue of fact as to whether defendants acted in concert to exclude nurse anesthetists from the Hospital.

Defendants argue that even if they collaborated to exclude CRNAs, the joint action does not constitute an antitrust conspiracy. They assert the evidence demonstrates that they were all acting on behalf of the Hospital, and that independent, unilateral action by a single entity does not qualify as concerted action. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). I turn to the substantive law under which defendants' assertion must be resolved.

[28] A company "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id.* It has been held that "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 2741, 81 L.Ed.2d 628 (1984); *accord Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 n. 7 (9th Cir.1979). This is because employees and "officers of a single firm are not separate

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economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Copperweld Corp.*, 467 U.S. at 769, 104 S.Ct. at 2740. Conversely, officers or employees acting on their own behalf may be subject to liability for an antitrust conspiracy. *Id.* at 769-70 n. 15, 104 S.Ct. at 2741 n. 15; *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 387 (10th Cir.1985) (employees capable of conspiracy with corporate employer where they have an independent personal stake). The central question is whether the ultimate interests of the firm and the alleged co-conspirators are identical. See *id.* at 772 n. 18, 104 S.Ct. at 2742 n. 18. The question of whether the defendants were capable of an antitrust conspiracy is a question of fact. *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1468 (9th Cir.1983). If a reasonable inference can be drawn that the alleged conspirators were not acting as a single economic entity, summary judgment is precluded. *See id.*

[29] In the matter at bar, at least some participants in the alleged conspiracy may have had economic interests that were different from the interests of the Hospital. The M.D. anesthesiologists and surgeons were not employees or officers of the Hospital but rather independent contractors. As such, the evidence suggests that they may have had an independent personal stake in any decision by the Hospital. *Cf. Weiss v. York Hospital*, 745 F.2d 786, 815 (3d Cir.1984) (each medical staff member of Hospital has distinct economic interest). Accordingly, there is a disputed issue of material fact as to whether the alleged combination to exclude CRNAs was an

independent, unilateral decision by the Hospital.[8] Under the circumstances, I cannot grant the motion for summary judgment on the ground that there was no contract, combination, or conspiracy.

b. Restraint of Trade

Although section 1 provides that every conspiracy in restraint of trade violates the law, it has long been settled that the term "every" as used in section 1 refers only to those agreements which "unreasonably" restrain trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 58-60, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911); *O.S.C. Corp. v. Apple Computer Co.*, 792 F.2d 1464, 1467 (9th Cir.1986). Depending on the nature of the claim, there are two modes of legal analysis for determining whether an agreement "unreasonably" restrains trade--the per se rule and the rule of reason. *T.W. Elec. Service*, 809 F.2d at 633. Bhan argues that defendants' alleged conspiracy to exclude CRNAs was an unreasonable restraint of trade under either analysis.

(1) Per Se Analysis

Through the course of antitrust litigation, the courts have found that some restraints are so consistently contrary to the principles of a free market



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[8] Of course, defendants may have had economic interests different than the M.D. anesthesiologists and surgeons, and, in fact, Menaugh may have been acting only on behalf of the Hospital. I conclude only that the evidence before the court gives rise to a reasonable inference that the alleged co-conspirators were not acting as a single economic unit. The fact that some members of the alleged combination may have shared an identical economic interest is beside the point.

economy, and so plainly without redeeming economic virtue, that they are illegal *per se*, i.e., they "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). The Supreme Court and the Ninth Circuit have applied the per se rule to four different kinds of agreements: horizontal and vertical price fixing, horizontal market division, group boycotts or concerted refusals to deal, and tying arrangements. *See Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370 (9th Cir.1983). These agreements are presumptively illegal because they are typically "naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963).

At first blush, the arrangement at issue here would appear to be akin to a group boycott or a concerted refusal to deal. Nonetheless, the reasoning of the Supreme Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), suggests that the policy of the Hospital of excluding nurse anesthetists from performing anesthesia during the course of surgery is more appropriately analyzed as a tie-in (or tying) agreement. A "tie-in" is established when a seller refuses to sell one product (the tying product) unless the buyer also purchases another (the tied product). In *Jefferson Parish Hospital*, the court found that the hospital requirement that the users of the hospital's operating room purchase the hospital's chosen anesthesia service constituted a tying arrangement. Similarly, in this case, the Hospital's policy compels those who obtain surgery (the tying product) to purchase anesthesia services provided by an M.D. anesthesiologist (the tied product). The arrangement in effect precludes patients at the

Hospital from choosing to have nurse anesthetists perform anesthesia when undergoing surgery at the Hospital.

[30][31] In proving that a tie-in arrangement is illegal, a plaintiff must show (1) a tie-in between two distinct products or services, (2) sufficient economic power in the tying product market to affect the tied product market, and (3) that a not insubstantial amount of commerce in the tied market product is affected. *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479 (9th Cir.1983). Under the reasoning of Jefferson Parish Hospital, the Hospital arrangement with the M.D. anesthesiologists is a tie-in between two distinct services, surgery and anesthesia. Thus, the question I must address here is whether defendants have sufficient economic power in the tying product market.[9]

(a) Relevant Product Market

Since market power can only be measured in
[669 F.Supp. 998, *1019]
product market, the market definition bears directly upon the degree of market power a firm has. Thus, to prove that a defendant has market power, the first crucial step is to establish the bounds of the relevant market. In general, the relevant market is "the area of effective competition" as to a particular product. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). "In economic terms, a 'market' embraces one firm or any group of

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[9] If the concerted action plainly has some anticompetitive effect, a showing of economic power may not be required. See NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 108-110, 104 S.Ct. 2948, 2963-65, 82 L.Ed.2d 70 (1984). An analysis of economic power is called for here because there is a complete failure of proof as to whether the exclusion of CRNAs from Manteca Hospital had an anticompetitive effect in a relevant market. See section VB1b(2), infra.

firms which, if unified by agreement or merger, would have market power in dealing with any group of buyers." II P. Areeda & D. Turner, Antitrust Law ¶ 518, at 347 (1978). "[D]efining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 (9th Cir.1979), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980).

According to Areeda and Turner, the identification of a market in any given case must take into consideration a geographic dimension, a product dimension, and a production dimension. II Antitrust Law ¶ 517, at 346. The geographic dimension is the physical area within which the particular product or service is or may be sold to consumers. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F.Supp. 1504, 1523 (E.D.Cal.1983); II Antitrust Law ¶ 522, at 299 (1986 Supp.). The product dimension refers to the availability of products that, because of their similarity to the disputed product, may be used in place of the disputed product. *Grason*, 571 F.Supp. at 1521-23; II Antitrust Law, ¶ 517, at 346. Where one product may be easily substituted for another product, "it may be said that the cross-elasticity of demand between them is relatively high, and therefore the two should be considered in the same market." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1271 (9th Cir.1975). To permit the trier of fact to assess cross-elasticity of demand, plaintiff must ordinarily produce evidence of "market data, figures or other relevant material adequately describing the nature, cost, usage, or other features of competing products." *Grason*, 571 F.Supp. at 1521 (quoting *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 919 (8th Cir.1976)). The

production dimension has to do with the capacity of other companies to produce or make available the product or service in response to a price increase by a particular firm. See II Antitrust Law ¶ 517, at 346. The production dimension is important because a firm's "ability to raise price by restricting output is limited to the extent that other firms can profitably expand their output in response." II Antitrust Law, ¶ 519b, at 349. The capacity of a firm to fill the gap in production left by another firm seeking to limit its output is measured by the cross-elasticity of supply. *See id.*; *Twin City Sportservice*, 512 F.2d at 1271. Where a firm can easily increase production, or otherwise make the product or service available, the cross-elasticity of supply is said to be high. *See id.*
[32] In this case, the relevant market for surgical procedures (the tying product) must be defined. The plaintiff has the burden of proving the scope of the relevant market. *Cf. DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1344 (9th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980). In the instant case, the main consideration in defining the market is the geographical dimension. *See Jefferson Parish Hospital*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2.[10]
[669 F.Supp. 998, *1019]

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[10] The geographic dimension of the market is arguably the most important consideration since the geographic dimension establishes the boundaries within which a particular product is presently available. In this case, the plaintiff has offered no evidence pertaining to the cross-elasticity of demand, and the court can conceive of no service that could substitute for surgery. In addition, with respect to the cross-elasticity of supply, there is no evidence to suggest that facilities in the area which are not presently offering surgical procedures could provide them. Even without such information, however, the relevant market in this case can be sufficiently defined by identifying the geographic dimension of the relevant product. See, e.g., Jefferson Parish Hospital, 466 U.S. 2, 104 S.Ct. at 1553.

[33] It is undisputed that hospitals that are within 30 miles or 30 minutes of each other are in competition with each other. The undisputed evidence also establishes that there are at least five hospitals within 30 miles or 30 minutes of Manteca Hospital that provide surgical services. The market for surgery thus extends at least to those five hospitals which are in direct competition with Manteca Hospital.

(b) Market Power

[34][35][36][37] Having established the dimensions of the relevant product market, I next consider whether a trier of fact could draw a reasonable inference that Manteca Hospital had market power in that market. Market power is different than monopoly power. Monopoly power, which is required to prove a section 2 violation, "is the power to control prices or exclude competition" in the relevant market. *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); *Grason*, 571 F.Supp. at 1519. Market power, in contrast, is defined as the power that permits a firm "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital*, 466 U.S. at 14, 104 S.Ct. at 1559. Market power can be established by showing that the firm has a predominant share of the market. *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed.2d 11 (1962). Even if a firm does not have a predominant share of the market, however, it can possess market power if it offers a product that is unique or that has special appeal to consumers. *Id.*; *see also Digidyne Corp. v. Data Gen'l. Corp.*, 734 F.2d 1336, 1339-41 (9th Cir.1984), *cert. denied*, 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985). So long as the "seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over

all other buyers in the market," the seller has market power. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 503, 89 S.Ct. 1252, 1258, 22 L.Ed.2d 495 (1969). In the context of a tie-in arrangement, a seller has market power where it is in a position "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital*, 466 U.S. at 12, 104 S.Ct. at 1558. However, when the buyer of a product is free to buy the product elsewhere, a tying agreement is not illegal. *See id.* at 12 n. 17, 104 S.Ct. at 1558 n. 17. [38] Plaintiff does not argue, and there is no evidence to suggest, that the surgical procedures offered by Manteca Hospital are in some way [669 F.Supp. 998, *1019]
especially appealing to patients. Accordingly, a trier of fact would have to focus on the Hospital's share of the surgical market to determine whether the Hospital could exert some power over patients in the area as to their choice of an anesthesia provider. The undisputed evidence establishes that Manteca Hospital does not have a dominant share of the market for surgical services.

There are at least five hospitals that compete with Manteca Hospital by offering surgery: San Joaquin General, Doctors Medical Center, Tracy Community, St. Joseph's--Stockton, and Dameron. According to the undisputed state report addressing market shares, in 1983 Manteca Hospital had 40 licensed medical/surgical beds, and accounted for 8,610 patient days for medical/surgical procedures. In the same year, San Joaquin General, St. Joseph's, and Dameron had a combined total of 465 medical/surgical beds, and together accounted for 118,045 patient days. Even without factoring in the medical/surgical services that were available at the two other known competing

hospitals,[11] Manteca Hospital in 1983 had only a 7 percent share of the licensed medical/surgical beds available to patients in the area. Further, the 8,610 days that patients spent at Manteca Hospital for medical/surgical procedures represents, at most, only 6.8 percent of the total number of patient days spent at the hospitals in the area for such procedures. In short, whether based on the availability of beds in competing hospitals or the actual number of patient days spent at area hospitals for medical/surgical procedures, it appears that Manteca Hospital has less than a ten percent share of the market. *Cf. Jefferson Parish Hospital*, 466 U.S. at 26, 104 S.Ct. at 1566 (hospital did not possess market power when it attracted only 30 percent of patients residing in geographic market); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612, 73 S.Ct. 872, 882, 97 L.Ed. 1277 (1953) (newspaper that attracted 40 percent of sales and classified lineage did not possess market dominance). Plaintiff has certainly produced no evidence to demonstrate a larger market share. Moreover, many patients who live in the vicinity of Manteca go to other hospitals. The vast majority (78.2%) of Manteca Hospital's patients live in the area represented by ZIP code 95336; however, in 1983 nearly 60 percent (58.2%) of patients from that ZIP code area entered other hospitals in the area.

[39] It is obvious from the undisputed statistics before the court that patients in the "area of effective competition" have a wide spectrum of alternatives to the surgical services offered by Manteca Hospital. In no

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[11] The record does not indicate the number of medical/surgical beds or patient days at Doctors Medical Center or Tracy Community Hospital, the two other hospitals known to be within 30 miles or 30 minutes of Manteca Hospital. The record does show that in 1983 Doctors Medical Center had a total of 148 beds licensed for acute care, and that Tracy Community had a total of 59 beds licensed for acute care.

sense can it be said that the Hospital has sufficient economic power in the relevant market to affect the market. The evidence demonstrates that the markets for medical services in general, and surgical procedures in particular, are highly competitive in the area, and consequently, Manteca Hospital does not possess any power to force unwilling patients to accept its services. [669 F.Supp. 998, *1020]
does not like the arrangement at Manteca Hospital can simply go to another hospital. Because Manteca Hospital does not have sufficient economic power in the relevant market, it cannot be held liable for a per se violation of section 1.[12]

(2) Rule of Reason

[40][41] If a plaintiff cannot show that concerted action is illegal under a per se analysis, he may show that it is illegal under the rule of reason test. To prevail under the rule of reason test, the plaintiff must prove (1) that defendants acted in concert, (2) that the concerted action was intended to harm or unreasonably restrain competition, and (3) that the concerted action actually caused an injury to competition. *O.S.C. Corp.*, 792 F.2d at 1469. There is sufficient evidence in the record from which to draw an inference that the defendants acted in concert. See section VB1a, *supra*.

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12 Even if the Hospital had sufficient economic power in the tying product market, I would conclude that plaintiff could not prevail under a per se analysis. The third element plaintiff must prove is that the defendants' conduct affected a "not insubstantial" amount of commerce in the tied product. The tied product here is the provision of anesthesia services. As I explain below, there is a complete absence of proof regarding the effect of the Hospital's decision on anesthesia services in the market. Moreover, if the Hospital's policy is analyzed as a concerted refusal to deal, the same factors require the same result.

There is, however, a complete absence of evidence from which a jury could draw a reasonable inference that competition between nurse anesthetists and M.D. anesthesiologists has been harmed.

[42][43] Plaintiff has the burden of demonstrating that the defendants' action interfered with competition. *Jefferson Parish*, 446 U.S. at 29, 104 S.Ct. at 1567; DeVoto, 618 F.2d at 1344; *see also Cascade Cabinet*, 710 F.2d at 1373 (summary judgment appropriate when plaintiff fails to produce evidence of harm to competition). Although plaintiff has demonstrated that he was injured, injury to the antitrust plaintiff is insufficient to prove injury to competition. *O.S.C. Corp.*, 792 F.2d at 1469. Plaintiff must instead prove that competition in the relevant product market has been harmed in some way. *DeVoto*, 618 F.2d at 1344-45. To prove that competition in a relevant market has been harmed, plaintiff must first prove the existence of a relevant market. *See Jefferson Parish*, 446 U.S. at 29, 104 S.Ct. at 1567; *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422-23 & n. 14 (11th Cir.1984).

The relevant market discussed above (in the context of the per se analysis) was the market for surgical services. That is because surgery is the product which "ties" anesthesia services. The relevant market for determining the anticompetitive effect of defendants' conduct under a rule of reason analysis is not necessarily the same as the relevant market under the per se analysis. *See Jefferson Parish*, 446 U.S. at 29, 104 S.Ct. at 1567. In this case, it would appear that the relevant market is the market for anesthesia services, not surgical services, since any competition between nurse anesthetists and M.D. anesthesiologists would affect the provision of anesthesia. Plaintiff has completely failed to produce evidence from which an inference can be drawn as

[669 F.Supp. 998, *1021]

to the boundaries of that market.

Defendants have satisfied their burden by pointing out that plaintiff has failed to obtain any expert testimony or discover any other evidentiary basis from which to deduce the boundaries of the market for anesthesia services. *Cf. Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir.1982) (without benefit of expert testimony or other credible evidence to support an inference of market power from the list of companies and the market share, any such inference would be sheer speculation). Plaintiff's lack of evidence stems largely from his faulty assumption that the relevant market is confined to Manteca Hospital.

As I explained earlier, defining the relevant market requires an examination of the geographic dimension, the product dimension (measured by cross- elasticity of demand), and the product dimension (measured by cross-elasticity of supply). From the evidence before the court, it is simply impossible to infer the geographical boundaries of the market for anesthesia services. While the record suggests that both M.D. anesthesiologists and nurse anesthetists practice at hospitals and clinics in the area, there is no evidence as to the distribution of such providers. The geographic market for anesthesia services may be the same as the geographic market for surgical services, but one simply cannot determine this from the evidence. Similarly, plaintiff has no evidence which addresses the cross-elasticity of demand, that is, the extent to which patients could reasonably substitute other services, such as the services of M.D. anesthesiologists for the services of nurse anesthetists.[13] Finally, there is no

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[13] The circuit's previous decision in this case held that the question of whether CRNAs' services may be substituted for M.D. anesthesiologists' services could not be resolved as a matter of law; thus the issue of cross-elasticity of demand is ultimately one of fact.

evidence which addresses the cross-elasticity of supply.[14]

Since defendants satisfied their burden in showing that there was a clear absence of evidence on an essential element with respect to which the plaintiff has the ultimate burden of proof, it was incumbent upon plaintiff to produce evidence showing the fact is in dispute. *See Celotex*, 106 S.Ct. at 2552-53. Plaintiff has failed to do so. All plaintiff did in response was to
[669 F.Supp. 998, *1022]
make an unsupported assertion that the market was confined to Manteca Hospital. That position is absolutely without foundation and must be rejected. Even if there was sufficient evidence to identify the boundaries of the relevant market, there is no evidence which shows that the decision of the Hospital to permit only anesthesiologists to practice had an anticompetitive effect in the market. It may well be that, under the circuit's decision in this case, the Hospital's preclusion of nurse anesthetists from practicing at the Hospital could be unlawful if it foreclosed so much of the market from penetration by nurse anesthetists as to constitute an unreasonable restraint on competition. *Cf. Jefferson Parish Hospital*, 466 U.S. at 30 n. 51, 104 S.Ct. at 1568

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[14] Although plaintiff does not make the argument, it may be that the fact that Bhan was able to provide anesthesia services before the termination of the AAS contract provides a factual premise for an inference to be drawn that a CRNA's services are, at least to some extent, a reasonable substitute for an M.D. anesthesiologist's services. Yet the question of whether such services are readily substituted is open to question as a realistic matter. See Matsushita, 106 S.Ct. 1348. At least in part this entire case arose because some surgeons did not want to be responsible for the supervision of Bhan, and others felt CRNAs were not competent to provide certain kinds of anesthesia. Since I resolve the question based on plaintiff's complete failure to address the question of the distribution of anesthesia providers in the market or even the question of the proper measure of the market, I need not resolve the question of the propriety of drawing an inference in plaintiff's favor.

n. 51. However, the evidence suggests that some nurse anesthetists presently practice in hospitals and clinics in the area.[15] Moreover, plaintiff has produced no evidence demonstrating that he looked for a position as nurse anesthetist in the area. Finally, most if not all surgeons who practice at Manteca Hospital have staff privileges at other hospitals in the area. There is no evidence to suggest that a surgeon would be prevented from using a nurse anesthetist at another hospital if the surgeon or the patient so desired.

Because there is a complete failure of proof as to the scope of the relevant market and the anticompetitive effect that the Hospital's decision had on the relevant market, I conclude that plaintiff cannot prevail under a rule of reason approach. Because plaintiff has been unable to produce evidence which demonstrates an unreasonable restraint of trade, under either a per se analysis or the rule of reason, the motion for summary judgment as to the section 1 claim must be GRANTED.

2. Section 2 Violation

(44)(45)(46) Plaintiff also alleges that the defendants violated 15 U.S.C. § 2. See supra footnote 5. Plaintiff alleges a monopolization claim, an attempted monopolization claim, and a conspiracy to monopolize claim. To prevail on a monopolization claim under section 2, Bhan must show that defendants (1) possessed monopoly power in a relevant market, (2) willfully acquired or maintained that power, and (3) caused antitrust injury. *Catlin v.*

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15 It is unclear how many nurse anesthetists actually practice in the area. Menaugh, the Hospital Administrator, believed that there was at least one, and possibly three, hospitals which employed nurse anesthetists. In addition, an unspecified number practice in clinics in the area.

*Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir.1986). To succeed on an attempted monopolization claim, Bhan must show that defendants (1) had a specific intent to monopolize a relevant market, (2) engaged in predatory or anticompetitive conduct, and (3) that there existed a dangerous probability of success. *Id.* at 1348; *cf. Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir.1980) (conspiracy to monopolize similar to attempt to monopolize). A dangerous probability of success can be inferred when the defendant has market power or when the evidence demonstrates that a defendant >had a specific intent to monopolize and took specific steps to accomplish monopolization. *Inglis*, 668 F.2d at 1029.

(47) Bhan cannot prevail on the monopolization claim because, as noted above, he has failed to provide any evidence of the relevant market for anesthesia services, let alone power in that market. Plaintiff's failure to produce evidence from which the boundaries of the relevant market could be inferred also requires summary judgment on the attempted monopolization claim. Moreover, the evidence shows that, whatever market is a proper measure of the claim, the defendants had no chance of monopolizing that market. For the same reasons, there is a complete absence of evidence to support a claim for conspiracy to monopolize. The motion for summary judgment as to the section 2 claim is GRANTED.

## VI

## PENDENT STATE CLAIMS

Because I have granted summary judgment in favor of defendants as to the federal claims, the pendent state claims should be, and hereby are, DISMISSED. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218

(1966).

IT IS SO ORDERED.

**4. *Bhan v. NME Hospitals*, 1985-1 Trade Cases ¶ 66,500, (1984 WL 21895) (E.D.Cal. 1984) [Not Reported in F.Supp.]**

VINOD C. BHAN, C.R.N.A.
v.
NME HOSPITALS, INC., ET AL.

Civil No. S-83-295 LKK
U.S. District Court, Eastern District of California
Filed June 19, 1984

KARLTON, Ch. J.

*1 Defendants California Society of Anesthesiologists, Inc., and California League of Anesthesiologists, Inc., have moved to dismiss the complaint in the above-captioned matter for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). All other defendants have joined in the motion. Should their motions be granted, defendants further move to dismiss plaintiff's pendent state claims. The allegations of plaintiff's complaint are set forth as follows:

Plaintiff is a certified registered nurse anesthetist (CRNA) who until April of 1983 performed the bulk of his practice at Manteca Hospital pursuant to the hospital's contract with Associated Anesthesia Services. That contract expired on March 31, 1983, at which time the hospital adopted a policy of allowing only M.D. anesthesiologists to perform anesthesia services in the hospital's operating rooms. Consequently, plaintiff was precluded from practicing his profession at Manteca Hospital.

Plaintiff filed the instant complaint on March 28, 1983. It alleged that the hospital's policy violates the federal antitrust laws and included several state law claims. The complaint was accompanied by a request

for a temporary restraining order preventing the hospital from excluding plaintiff from the practice of anesthesia services at the hospital. This court declined to issue the temporary restraining order on April 5, 1983.

Plaintiff's federal claims are predicated upon Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. He alleges that the defendants conspired and combined to eliminate competition in the provision of anesthesia services at the hospital, that they monopolized, attempted to monopolize, and conspired to monopolize the provision of those services, and that they formed and maintained a pool of economic and professional power and resources to eliminate competition and exclude nurse anesthetists from the market for anesthesia services at the hospital. In doing so, defendants allegedly acted with the intent to eliminate and stifle competition in the provision of anesthesia services and with the purpose of foreclosing CRNA's from competition, with the result that monopoly control would be solidified such that costs of anesthesia services would increase.

The acts that plaintiff alleges support these claims are as follows: In January of 1983, defendant Menaugh, the hospital administrator, entered into negotiations with defendant Yong Suk, M.D., to induce Suk to relocate from Michigan to Manteca and to perform anesthesia services at the hospital. Menaugh offered Suk either an exclusive contract with the hospital or the right to determine what services would be provided and by whom. The anticipated arrangement caused concern to Michael Cull, M.D., who was the
[198] WL 21895, *1 (E.D.Cal.))
anesthesiologist then working at the hospital. Cull contacted either the California Society of Anesthesiologists or the California League of Anesthesiologists to voice his opinion that the hiring of Suk would result in loss of income to either himself or

to plaintiff or would result in the revocation of his anesthesia privileges. The anesthesiologists' organizations and Suk combined to induce Menaugh to recommend that the hospital board adopt the anesthesiologist-only policy and exclude CRNAs from anesthesia practice. They were motivated by the fact that CRNAs typically perform anesthesia services at a lower cost and with greater scheduling flexibility than M.D. anesthesiologists, making their services more attractive to consumers. *2 Defendants have moved to dismiss the complaint on the ground that plaintiff has not suffered an injury the antitrust laws are designed to prevent in that he does not compete with M.D. anesthesiologists. In other words, it is argued that plaintiff lacks standing to sue.

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiffs the benefit of every reasonable inference to be drawn from the "'well-pleaded"' allegations of the complaint. *Retail Clerks International Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiffs need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. *See ibid.; Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963). In general, the complaint is construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In spite of the deference the court is bound to pay to the plaintiff, however, it is not proper for the court to assume that "the pleader can prove facts which [he] has not alleged or that the defendants have violated the ... laws in ways which have not been

alleged. *Associated General Contractors v. California State Council*, [459] U.S. [519], 103 S.Ct. 897, 902 (1983). In light of these standards, I turn to the merits of defendant's motions.

Standing to sue for redress of an alleged antitrust violation is governed by Section 4 of the Clayton Act,[16] 15 U.S.C. § 15(a), which by its terms seems to afford standing to anyone injured by reason of an antitrust violation. That language has been substantially narrowed through judicial interpretation, however, resulting in the need for courts to determine whether the alleged injury is one the antitrust laws were intended to remedy. *See, e.g., Brunswick Corp. v. Pueblo Bowl-o-Mat*, 429 U.S. 477, 487-88 (1977); *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967).

The Ninth Circuit has developed a three-step analysis of Sherman Act standing. *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979). The first standing requirement is that plaintiff allege an antitrust violation. See *Solinger* at
[1984 WL 21895] *2 (E.D.Cal.))
1309. Plaintiff has clearly done so here by his allegations that defendants combined and conspired to restrict the market for anesthesia services to those performed by anesthesiologists. He has also alleged an attempt to monopolize and actual monopolization of that market. The second standing requirement is that plaintiff allege that he sustained injury to his business or property. The allegation that plaintiff has been foreclosed from performing any anesthesia services at Manteca Hospital where he was previously regularly

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[16] Section 4 provides, in pertinent part: "... any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ..."

employed clearly satisfies this requirement.

*3 The last standing requirement is that plaintiff have sustained the claimed injury by reason of the defendants' allegedly illegal activities. Solinger at 1310. In other words, plaintiff's injury must be the result of the unlawful character of defendants' acts. *See Kapp v. National Football League*, 586 F.2d 644, 648 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979) (quoting Brunswick, supra, at 489). In a Sherman Act case such as this, the unlawful quality of the defendants' acts lies in their alleged anticompetitive effect. *See DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1344 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 732 (9th Cir. 1979); *Kapp, supra*, at 648 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)). It is in this context that defendants' argument concerning plaintiff's status as a competitor becomes relevant: if plaintiff's injury does not result from defendants' conduct's effect on competition in the relevant market, he has not sustained an antitrust injury.

Analysis of the allegedly anticompetitive effect of a defendant's illegal conduct must begin with a definition of the market in which that effect is alleged to have occurred. *DeVoto, supra*, at 1345. The relevant market is the "'area of effective competition"' in which there is "substitutability of demand."' *See Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1300 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982) (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)). Stated another way, it is that area of the economy in which the products or

services[17] involved are reasonably interchangeable by consumers for the same purposes. *United States v. E.I. duPont De Nemours & Co.*, 351 U.S. 377, 395 (1956). *See also United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301-02 (9th Cir. 1978). It follows, therefore, that if the products or services at issue are not interchangeable as viewed from the consumer's perspective, there is no relevant market, and plaintiff and defendant are not in competition. In turn, unless a plaintiff and a defendant compete, the plaintiff cannot allege injury caused by the "'anticompetitive effect"' of defendants' acts and thus cannot satisfy the third prong of the Solinger standing analysis.

As applied to the case at bar, the above analysis requires the court to determine whether the services provided by a CRNA are an available substitute from the consumer's perspective for those provided by an M.D. [1984 WL 21895, *3 (E.D.Cal.)] anesthesiologist. See generally L. Sullivan, Antitrust at 56 (1977). Plaintiff insists that the determination of whether particular parties compete in any given instance is a question of fact and thus not susceptible to disposition on a motion to dismiss. As a general matter he is, of course, correct. *See, e.g., Grason Electric v. S.M.U.D.*, 571 F.Supp. 1504 (E.D. Cal. 1983). Nonetheless, as I point out, infra, California has, by statute, provided that CRNAs and M.D. anesthesiologists cannot lawfully compete. The statute so enacted, then, has an undeniable anticompetitive effect. The question thus raised as a preliminary matter is whether the State may by statute restrict

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17 Markets for services are subject to antitrust scrutiny to a like extent as markets for products. See, e.g., Goldfarb v. Virginia St. Bar, 421 U.S. 773, 787 (1975); Williams v. St. Joseph Hosp., 629 F.2d 448,453(7th Cir. 1980).

competition or whether the doctrine of preemption restricts its ability to do so. That is, when a state enacts a law which to some degree at least, conflicts with the federal policy of fostering competition as embodied in the antitrust laws, may that law be enforced?

*4 Examination of the relevant case law reveals that the mere fact that a state statute may have an anticompetitive effect does not necessarily result in its invalidation. *Rice v. Norman Williams Co.*, [458] U.S. [654], 102 S.Ct. 3294, 3299 (1982). *See also New Motor Vehicle Bd. v. Orin Fox Co.*, 439 U.S. 96, 110-11 (1978):

> Appellees also argue conflict with the Sherman Act because the [State statute] permits auto dealers to invoke state power for the purpose of restraining intraband competition. "This is merely another way of stating that the ... statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act-'our charter of economic liberty.' ... Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the ... statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed."' *Exxon Corp v. Governor of Maryland*, 437 US 117, 133, 57 L Ed 2d 91, 98 S Ct 2207 (1978).

The State, in this case, has elected to exercise its police power[18] to protect the health and safety of its citizens by limiting the scope of a nurse's authority. Where, as here, the exercise of the State's power has only an incidental effect upon competition, and where

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18 Medical licensing requirements may be enacted by a state pursuant to its police power. See, e.g., Panhandle Eastern Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613, 622 (1935); In re Rameriz, 193 Cal. 633, 649-50, 226 P.914, 921 (1924).

the purpose of its regulation is not to restrain competition, it has been held that the Sherman Act does not preempt the state statute. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Armco Steel Corp. v. United Mine Workers*, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 377 (1975); *Summey v. Ford Motor Credit Co.*, 449 F.Supp 132, 137 (D.C. Ga 1976) ("Congress did not intend the Sherman Act to preempt and supersede state law proscribing conduct which might have only an incidental effect on competition, albeit a restrictive one".) In sum, where, as here, the state's purpose is regulatory, the subject matter is within the traditional police powers of the state and the effect on competition is essentially incidental, the state statute is valid and viable. Accordingly, California's regulation of physicians and nurses, to the degree that it defines competition between the two groups, will be given its full effect. I now turn to the relevant California law.[19]

The provision of anesthesia services involves two steps: the selection of the anesthetic agent and administering of that agent to the patient. The extent to which CRNAs and anesthesiologists "compete" therefore depends on the degree of authority conferred by state law on each classification of practitioners[20] to perform those two functions.

*5 Under California law a nurse may administer anesthesia. *See, e.g., Magit v. Board of Medical*

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19 The court has taken judicial notice of the relevant California statutes and regulations. See United States v. One 1975 Thunderbird, 576 F.2d 834, 836 (10th Cir. 1978); Williams v. Townsend, 283 F. Supp. 580, 581 (C.D. Cal. 1968).

20 The Supreme Court has recognized that the police power includes the "broad power to establish standards for licensing practitioners and regulating the practice of professions." Goldbarb v. Virginia State Bar, 421 U.S. 788, 792 (1974).

*Examiners*, 57 Cal. 2d 74, 83, 366 P.2d 816, 819, 17 Cal. Rptr. 488, 491 (1961); *Chalmers-Francis v. Nelson*, 6 Cal. 2d 402, 404, 57 P.2d 1312, 1313 (1936); Cal. Bus. & Prof. Code 2725(b). See also 22 Cal. Adm. Code § 70235(b) (Medi-Cal services); however, that authority is circumscribed in two respects. First, a nurse apparently may administer only general anesthesia. See 56 Ops. Cal. Att'y Gen'l 1, 2 (1972). See also 22 Cal. Adm. Code § 51326(a)(2) (Medi-Cal programs). Second, in administering anesthesia a nurse must act at the direction of, and under the effective supervision of, inter alia, a physician.[21] *Magit, supra*, at 83, 366 P.2d at 819, 17 Cal. Rptr. at 491; *Chalmers-Francis, supra*, at 404-05, 57 P.2d at 1313; Cal.Bus. & Prof. Code § 2725(b). See also 22 Cal. Adm. Code §§ 51326(a)(1), 70235(a) (Medi-Cal.); 64 Ops. Cal. Att'y Gen'l 240, 250 (1981). That is, a nurse may administer medication only pursuant to a treatment regimen ordered by a physician. Moreover, it is only because of the exercise of a physician's medical judgment (in ordering the treatment) that the nurse's actions are not the illegal practice of medicine. *See Magit, supra*, at 83, 366 P.2d at 819, 17 Cal. Rptr. at 491; *Chalmers-Francis, supra*, at 404-05, 57 P.2d at 1313; Cal.Bus. & Prof. Code § 2051, 2052 (practice of medicine). See also 64 Ops. Cal. Att'y Gen'l 240, 251 (1981) (nurse may not administer medication pursuant to standard procedures because those procedures lack required degree of direction and supervision by physician).

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[21] A certified registered nurse anesthetist is a registered nurse certified as a nurse anesthetist by the American Association of Nurse Anesthetists. See 22 Cal. Adm. Code s 70055(19) (defining nurse anesthetists for Medi-Cal purposes). CRNAs are not licensed by the State of California apart from their licensing as registered nurses however. See 56 Ops. Cal. Att'y Gen'l 1, 2 (1972). The scope of their duties and functions is thus defined primarily by reference to the law applying to registered nurses generally.

[1984 WL 21895, *5 (E.D.Cal.)]

The selection of an anesthetic agent constitutes the prescription of medication and, with a few exceptions not relevant here, may not be performed by nurses. See Cal. Bus. & Prof. Code § 4036. Compare *id.* § § 2051, 2052 (practice of medicine) with *id.* § 2725(b) (practice of nursing). Plaintiff seeks to deprecate the physician's role in this aspect of anesthesia practice by characterizing the prescription process as a mere "countersigning" of a medication order prepared by a CRNA. The argument will not lie. Even if, as plaintiff asserts, the physician's active role in the prescription of anesthetic drugs is reduced to countersigning orders prepared by others, that function is of great legal significance. The act of countersigning constitutes validation or authentication of the order prepared by the CRNA, for absent the physician's exercise of medical judgment the medication order would not become effective. Absent at least some degree of direction and supervision by a physician, a CRNA's selection of medication would constitute the illegal practice of medicine. *See Magit, supra*, at 83, 366 P.2d at 819, 17 Cal. Rptr. at 491; *Chalmers-Francis, supra*, at 404-05, 57 P.2d at 1313. *6 In short, under California law, the scope of an anesthesiologist's authority as distinguished from that of a CRNA is functional. Under California, law, anesthesiologists, as physicians, may prescribe and administer medication without supervision while nurses cannot do so. Thus under California law, the required exercise of medical judgment attendant upon the administration of anesthesia may therefore be provided by the same person who performs the physical act of administering the anesthesia only when that person is a physician. Although a CRNA may also perform the physical act of administering general anesthesia, the participation of a physician in prescribing the anesthetic and supervising

its administration is required. [22]

Plaintiff seeks to minimize the difference between the scopes of the functions performed by the two categories of practitioners by arguing that operating room custom has enlarged the role of the nurse anesthetist to encompass more of the functions of an anesthesiologist than a strict analysis of the express legal authorities might suggest. The California Legislature has expressed its intent to incorporate functions that have gained "common acceptance and usage" into the definition of the practice of nursing. Cal. Bus. & Prof. Code § 2725. Accordingly, the development of customs and practices tending to expand the functions of registered nurses is properly considered when deciding whether the services of a CRNA and an anesthesiologist are sufficiently interchangeable to be considered competitive. For purposes of resolving a motion to dismiss, this court must assume that the number of functions performed by registered nurses has increased due to the development of new customs and procedures. Nonetheless, the plain words of the statute perforce delimit the effect of custom. Thus, although custom and usage has a role, it could not overtake explicit legal requirements regarding the necessary degree of physician participation, supervision, and exercise of medical judgment with regard to patient care. For instance, the practice of having a CRNA determine the type

[1984 WL 21895, *6 (E.D.Cal.)]

of anesthetic to be administered and then having an M.D. countersign the order cannot, as a matter of law, effect the requirement that the M.D.'s countersigning is

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[22] Podiatrists, dentists, and clinical psychologists may also prescribe treatment regimens under which nurses may administer medication. Cal. Bus. & Prof. Code s2725(b).

the prescription of medication, a function reserved for physicians. See discussion *supra*. Similarly, the prescription of medication by an M.D. to be administered by the CRNA "as needed," while involving discretionary conduct on the part of the CRNA, does not eliminate the requirement that the physician exercise medical judgment in the prescription process. In effect, while plaintiff may point to custom or usage, he cannot do so to the point of obviating the state's requirement of participation of an M.D. in the provision of anesthesia services.

*7 In summary, while an M.D. anesthesiologist may function totally independent of other medical personnel with regard to the provision of anesthesia services, a CRNA's authority to perform those services is circumscribed by the necessity that a physician's medical judgment be brought to bear with regard to the prescription of anesthesia. Even if CRNAs are credited with the fullest discretion plaintiff would ascribe to them, it is legally impossible for them to perform their functions absent some degree of involvement by a physician.

The effect of California's limitation on the ability of a consumer to choose between the two types of practitioners on plaintiff's claim seems apparent. Since a patient cannot elect to use the services of a CRNA without necessarily involving a physician in the provision of anesthesia, the services of a CRNA are not freely substitutable for those of an anesthesiologist. *Compare Virginia Academy of Clinical Psychology v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980) (psychologists and psychiatrists were "separate economic entities" under state law and thus capable of competing). If plaintiff and defendants cannot compete under California law, no relevant market has been adversely affected and hence, no injury to competition could have occurred. Plaintiff's fallback argument is that legal restrictions on the scope of a nurse's

functions and on the degree of independent judgment he or she may exercise merely serve to contract the relevant market in this case rather than eliminate it altogether. Although he is correct insofar as he asserts that it is not necessary that the full range of services performed by a CRNA and by an anesthesiologist be identical for them to be in competition, the argument misses the point. By operation of law there is no situation in which a CRNA is truly able to compete with an anesthesiologist.[23] A patient who wishes to find a substitute for the services of an anesthesiologist will find that the services of a CRNA fill his or her requirements only when utilized in conjunction with those of a physician. Of course, the physician in question need not be an anesthesiologist: a surgeon or other attending physician may supervise the activities of a CRNA. The fact remains, however, that a consumer seeking an alternative to the services of an anesthesiologist and desiring to use a CRNA must effectively obtain the services of a second practitioner, a physician, as well. Of course, as a practical matter a physician is always present in order to perform the surgery. Nonetheless, such a physician has been engaged for the surgery and the medical judgments pertaining to the administration of anesthesia constitute a distinct function. While the surgeon may thus create a factual situtation in which plaintiff may provide the service of administering anesthesia, that simply does not resolve the issue. It is important to keep in mind that [1984 WL 21895] anesthesiologists compete in the provision of the service supplied by both; that is, do both provide a service

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[23] It goes without saying that within the confines of the Constitution and federal law, the state is free to make such a judgment. Whether this court agrees with the State's judgment is quite beside the point. This court is not free to second guess the State legislature in this regard.

which is interchangeable. The practical effect of the law is that they do not. The administration of anesthesia requires two separate functions-one, the physical act-the other, a medical judgment. As to the latter function, the law prohibits a nurse from providing the service.

*8 Since the services of a CRNA cannot freely be substituted by consumers for those of an anesthesiologist, there is no relevant market occupied by both practitioners. Thus, any injury sustained by plaintiff as a result of Manteca Hospital's adoption of an anesthesiologist-only policy is not an injury to competition and not cognizable under the antitrust laws. Therefore, plaintiff does not have standing to sue for an antitrust violation. *See generally Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). Plaintiff's antitrust claims are hereby Dismissed with prejudice.

I now turn to the issue of plaintiff's pendant state claims.[24] Under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the district court is ordinarily to dismiss pendant state claims when the federal claims are dismissed. *Id.* at 726. Dismissal is particularly appropriate, where, as here, no judicial resources have yet been expended on the state claims. Accordingly, plaintiff's pendant state claims are Dismissed without prejudice.

It Is So Ordered.

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[24] Plaintiff's complaint alleges that the facts pled also give rise to the following causes of action: Interference with Calling, Interference with Advantageous Economic Relations, Denial of Hospital Due Process, and Unfair Competition.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL - 2 1991

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

VINOD C. BHAN, C.R.N.A.,

Plaintiff-Appellant,

v.

NME HOSPITALS, INC., a Delaware Corp., dba: MANTECA HOSPITAL; NATIONAL MEDICAL ENTERPRISES, INC., a Nevada Corp.; CALIFORNIA SOCIETY OF ANESTHESIOLOGISTS, INC., a California Corp.; JOHN E. MENAUGH; SUK YONG, M.D.,

Defendants-Appellees.

Nos. 87-2727
87-2951

DC# CV-83-0295-LKK

ORDER

Before: SNEED, SCHROEDER, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court was advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

(2)

No. 91-575

FILED
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OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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VINOD C. BHAN, CRNA,
*Petitioner,*

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.
and JOHN E. MENAUGH,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-575

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VINOD C. BHAN, CRNA,

*Petitioner*,

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.
and JOHN E. MENAUGH,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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### INTRODUCTION

Vinod C. Bhan ("Petitioner") petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 25, 1991. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3295 (U.S. Sept. 30, 1991) (No. 91-575). The Ninth Circuit's decision affirmed an order of the United States District Court for the Eastern District of California granting summary judgment in favor of Respondents NME Hospitals, Inc., National Medical Enterprises, Inc. and John E. Menaugh ("Respondents"). *Bhan v. NME Hospitals, Inc.*, 669 F. Supp. 998 (E.D. Cal. 1987).

The complaint in this action stemmed from a decision by Manteca Hospital ("the hospital") not to renew an exclusive contract for the provision of anesthesia services in favor of an open staff anesthesiologist ("MDA")-only arrangement. This decision followed ongoing complaints by the hospital's surgeons concerning the lack of twenty-four hour coverage by MDAs under the contract, and the realization that the hospital could not support more than two anesthesia providers. The hospital's decision not to renew that exclusive contract had the effect of excluding Mr. Bhan, who is not an MDA and was employed by the party enjoying the exclusive contract, from providing anesthesia services at the hospital. Petitioner alleges violations of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), arising out of the hospital's implementation of the MDA-only policy.

Petitioner seeks review from the Ninth Circuit's decision affirming the grant of summary judgment in favor of Respondents solely on the grounds that the court erred in applying the rule of reason rather than the *per se* rule to evaluate his claim of a group boycott.[1] Petitioner asserts that the Ninth Circuit's decision conflicts with the precedents of this Court and with decisions of the Third and Seventh Circuits.

Respondents submit this opposition to the petition for certiorari pursuant to Rule 15 of the Supreme Court rules to address certain misstatements of fact and law

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[1] The Court has determined that certain agreements "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Agreements in the second category are subject to a balancing test—the rule of reason—used to determine whether their procompetitive virtues outweigh any anticompetitive effects. *Id.* at 691.

set forth in Petitioner's brief. As discussed below, Petitioner relies upon inapplicable precedent, attempts to contrive a conflict among the circuits that does not exist, and misapplies the decisions of this Court.

## REASONS FOR DENYING THE WRIT

### I. PETITIONER IGNORES EXISTING LAW ON GROUP BOYCOTTS AND RELIES UPON INAPPLICABLE PRECEDENT

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), this Court squarely addressed the issue whether group boycotts or concerted refusals to deal are subject to the *per se* rule. The plaintiff in *Northwest Wholesale Stationers* challenged, on a *per se* group boycott theory, its expulsion from a purchasing cooperative. The Court unanimously accepted the plaintiff's characterization of the defendant's conduct as a group boycott, or a concerted refusal to deal, but refused to apply *per se* analysis to that conduct. More specifically, the Court found that "[u]nless the [group engaging in the boycott] possesses market power . . . the conclusion that expulsion is virtually always likely to have an anticompetitive effect"—the conclusion upon which the *per se* rule is premised—"is not warranted." *Id.* at 296 (citations omitted). The Court therefore established that absent a threshold showing of market power on the part of the alleged conspirators, the *per se* rule may not be invoked. Accordingly, *Northwest Wholesale Stationers* implicitly overrules any previous decisions uniformly applying the *per se* rule to all group boycotts. *See Rickards v. Canine Eye Registration Foundation, Inc.*, 783 F.2d 1329, 1333 (9th Cir.) ("While there is some older case law suggesting that group boycotts are per se violations of section 1, the Supreme Court's most recent pronouncement on concerted refusals to deal [*Northwest Wholesale Stationers*] requires that we look to the type of boycott at issue to

determine if per se condemnation is required."), *cert. denied*, 479 U.S. 851 (1986) (citations omitted).

Petitioner ignores this Court's more recent precedent in arguing that the Ninth Circuit's decision refusing to apply the *per se* rule to the alleged group boycott is at odds with *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the rationale of which Petitioner claims was reaffirmed in *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991). As noted above, *Northwest Wholesale Stationers* implicitly overruled previous decisions that categorized group boycotts as *per se* unlawful without an initial market power inquiry. *Klor's*, which held that "[g]roup boycotts, or concerted refusals by traders to deal . . . have long been held to be in the forbidden [*per se*] category" is one such decision. 359 U.S. at 212 (footnote omitted).

Petitioner's reliance on *Pinhas* is entirely misplaced. He argues that *Pinhas* stands for the proposition that the *per se* rule should apply to any "conspiracy which misuses a 'gateway that controls access to the market for [plaintiff's] services.'" Pet'rs Br. at 7-8. The Court's decision in *Pinhas* did not address the merits of the plaintiff's boycott allegations. These allegations were examined in the context of a motion to dismiss the pleadings for failure to satisfy the jurisdictional interstate commerce requirement of the Sherman Act. *Pinhas*, 111 S. Ct. 1842. The Court simply assumed the truth of the facts alleged in the plaintiff's complaint. *Id.* at 1845.[2] Accordingly, the

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[2] Indeed, the quote from *Pinhas* upon which Petitioner relies is taken out of context. The Court's reference to the "gateway that controls access to the market," Pet'rs Br. at 7, is not a substantive assessment of the plaintiff's group boycott theory, but rather a summary of the plaintiff's characterization of the facts alleged in the complaint:

> The case involves an alleged restraint on the practice of ophthalmological services. The restraint was accomplished by an alleged misuse of a congressionally regulated peer review

Court's holding in *Pinhas* was limited to the issue whether the plaintiff's conspiracy and group boycott allegations satisfied the jurisdictional requirement of an effect on interstate commerce. *Id.* at 1847-48. The Court's analysis of that issue does not include a substantive review of the merits of the complaint to determine whether a group boycott is properly analyzed under either the *per se* rule or the rule of reason.

As discussed above, this issue is squarely addressed in *Northwest Wholesale Stationers*, which Petitioner apparently elected to ignore.[3] The Ninth Circuit correctly relied upon *Northwest Wholesale Stationers* in concluding that the conspiracy theory in this action, i.e., that physicians conspired with the hospital to allow only physicians—rather than non-physician providers—to offer services in a particular area, "does not appear to be one that is always anti-competitive." *Bhan*, 929 F.2d at 1412 (footnote omitted). Accordingly, the Ninth Circuit correctly applied the rule of reason.

## II. PETITIONER ATTEMPTS TO CONTRIVE A NON-EXISTENT CONFLICT AMONG THE CIRCUITS

Petitioner asserts that the Ninth Circuit's ruling conflicts with a decision of the Third Circuit in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985). Specifically, Petitioner relies upon *Weiss* for the proposition that once an action can be

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process, *which respondent characterizes* as a gateway that controls access to the market for his services.

*Id.* at 1848 (emphasis added; footnote omitted).

[3] Although the Court's more recent decision in *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) confirmed the applicability of *per se* analysis to certain types of boycotts, it did so in a context where the boycott at issue was inextricably linked to price-fixing—a *per se* restraint of trade. A boycott implemented to enforce a naked restraint could therefore be condemned on the basis of *per se* analysis without an explicit finding of market power. No such naked restraint exists in the instant case.

characterized as a group boycott or concerted refusal to deal, it is considered *per se* unlawful under section 1. 745 F.2d at 818; Pet'rs Br. at 11-12. *Weiss* was decided in 1984, one year prior to this Court's decision in *Northwest Wholesale Stationers.* As discussed above, *Northwest Wholesale Stationers* explicitly held that not all group boycotts or concerted refusals to deal are considered *per se* unlawful. Accordingly, the language relied upon by Petitioner from *Weiss* has been overruled by this Court.

In a further attempt to contrive a conflict among the circuits, Petitioner contends that the Ninth Circuit's analysis of the alleged group boycott included "an imagined 'patient care' difference." Pet'rs Br. at 15. Petitioner refers to footnote 7 of the Court's decision, where it noted two possible factual differences between this action and *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989), one of which was that "quality of care" could not possibly be an issue in *Hahn. Bhan*, 929 F.2d at 1412 n.7. This was the Court's only reference to the term "quality of care" and was clearly not a factor in its conclusion that the alleged group boycott should be analyzed under the rule of reason.[4] Accordingly, Petitioner's attempt to set up a conflict with the Seventh Circuit's decision in *Wilk v. American Medical Association*, 895 F.2d 352, 362 (7th Cir.), *cert. denied sub nom.* 111 S. Ct. 2621

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[4] In concluding that the hospital's policy to replace non-physician providers of anesthesia services with physician providers was not an activity that appears always to be anticompetitive, the court observed that such a policy could make the hospital a more efficient provider of services which would allow it to compete more effectively against other hospitals. *Id.* at 1412. This aspect of the court's analysis is not premised on quality of care concerns. It is simply an economic observation that the MDA-only policy *could* have the effect of making the hospital a more efficient provider of higher quality services, thereby enhancing its competitive position in the market. Such a showing, however, was not necessary to support summary judgment for respondents given the absence of evidence of anticompetitive effects in a properly defined relevant market.

(1990) should be disregarded and is not a basis for review of the Ninth Circuit's decision.

## III. PETITIONER MISAPPLIES THE ANALYSIS OF *FTC v. INDIANA FEDERATION OF DENTISTS*

Petitioner further criticizes the Ninth Circuit's opinion for acknowledging, but failing to "apply the teachings of," *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). Petitioner asserts that the Court erred in declining to employ the "quick look" test propounded in *Indiana Federation of Dentists*, opting instead for a thorough market analysis of the alleged restraint. Petitioner fails to recognize a crucial distinction between the allegations and proof in *Indiana Federation of Dentists* and the evidence in the record here.

In *Indiana Federation of Dentists*, the Court found evidence that a group of horizontal competitors—the dentists—had entered into an agreement "to withhold from their customers a particular service that they desire." *Id.* at 459. In other words, the Court had before it evidence of both an agreement, and anticompetitive effects resulting from that agreement. Given this evidence, the Court truncated its rule of reason analysis and focused on an inquiry into whether the dentists could demonstrate "some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *Id.* (citations omitted). Finding no such procompetitive benefit, the Court concluded that

> [the FTC's] finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

*Id.* at 461 (footnote omitted). In short, the Court found it unnecessary to engage in an elaborate analysis of the

relevant market given that the FTC had provided persuasive evidence of an agreement that had the effect of reducing competition.

No such evidence exists in the record of this action. The Ninth Circuit found that Petitioner failed to meet his initial burden of showing that the hospital's MDA-only policy "substantially restrains competition." *Bhan*, 929 F.2d at 1413. This deficiency stemmed largely from Petitioner's failure to consider essential market definition issues. *Id.* Accordingly, the court concluded that the challenged policy does not violate section 1.

Petitioner makes the bald assertion that the Ninth Circuit's opinion fails to acknowledge that the hospital's MDA-only policy resulted in the exclusion of a "class of lower-priced competitors," thereby "inherently" reducing competition at the hospital. Pet'rs Br. at 19. This claim of anticompetitive effects is unsubstantiated in two respects. First, Petitioner's statement presumes that a purported reduction in competition at this individual hospital constitutes cognizable harm under the antitrust laws. Anticompetitive effects must be measured in the context of a properly defined relevant market. The Ninth Circuit appropriately concluded that Petitioner had failed to produce sufficient evidence that the market in which hospitals compete for anesthesia services could be limited to the town of Manteca. Instead, the court found that "[a]nesthesia services available to hospitals could easily extend beyond the limits of Manteca. Hospitals may acquire them from hundreds of miles away." *Bhan*, 929 F.2d at 1413. With respect to Petitioner's claim of a one hospital market, the court concluded: "The only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition." *Id.* at 1414 (footnote omitted).

The second flaw in Petitioner's statement of anticompetitive effects is its premise that non-physician providers

of anesthesia services are the "lower-priced competitors." Pet'rs Br. at 19. The record in this proceeding is directly at odds with Petitioner's premise. The record before the Ninth Circuit demonstrates that (1) there was no evidence that the rate charged for petitioner's services "was ever lower than the rate charged for the services of an M.D. anesthesiologist"; and (2) after the non-renewal of the contract held by petitioner's anesthesia services group and implementation of the MDA-only policy, "the cost of anesthesia services at Manteca Hospital dropped." *Bhan*, 669 F. Supp. at 1010. In sum, there is no basis for Petitioner's assertion that the relevant market is limited to Manteca Hospital. Even assuming Petitioner could produce such evidence, however, the record demonstrates that the theoretical danger of excluding "lower-priced competitors" has no application to this case.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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November 6, 1991

OCT 28 1991

No. 91-575

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

VINOD C. BHAN, CRNA,
*Petitioner,*

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.,
and JOHN E. MENAUGH,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN ASSOCIATION OF NURSE ANESTHETISTS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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The American Association of Nurse Anesthetists ("AANA") hereby moves this Court for leave to file the attached brief amicus curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed on behalf of Vinod C. Bhan, CRNA.

As grounds therefor, AANA states that the decision below, using a rule of reason analysis, upholds a hospital's boycott of Certified Registered Nurse Anesthetists ("CRNAs"), accomplished by a newly adopted hospital policy of having all anesthesia provided by Medical Doctors of Anesthesiology ("MDAs"). Under the new hospital policy, Vinod C. Bhan, CRNA, lost his job as an anesthesia provider which he had performed with distinction for over three years. The hospital's boycott of CRNAs has the effect of excluding all 23,000 members of the

AANA from working at the hospital. Similar boycotts, enforced in other hospitals, exclude CRNAs from significant employment opportunities. AANA, as a national association representing CRNAs, is in a unique position to address these issues.

To protect the interests of the public and AANA members in vigorous competition as a method of controlling costs in the delivery of anesthesia services, AANA requests this Court to receive the attached brief and resolve the conflict between the Ninth and Third Circuits as to the applicability of the per se rule to group boycotts in circumstances such as those present here. This Court should make it clear that boycotts of nonphysician health care providers by hospitals and physicians constitute a per se violation of the antitrust laws.

Respondents have refused to consent to the granting of this motion.

For the above stated reasons, on behalf of the American Association of Nurse Anesthetists, we request that the motion be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1991

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## BRIEF OF THE AMERICAN ASSOCIATION OF NURSE ANESTHETISTS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

---

### INTEREST OF THE AMICUS CURIAE

The American Association of Nurse Anesthetists ("AANA") is an organization of more than 23,000 certified registered nurse anesthetists ("CRNAs") dedicated to providing quality anesthesia care in the United States. The practice of nurse anesthesia is well recognized in the health care community. CRNAs practice in all 50 states and administer over 65 percent of all anesthetics in this country.

Anesthesia may be provided either by a CRNA or by an anesthesiologist. Some CRNA's compete directly with medical doctors of anesthesiology ("MDAs") in the mar-

ket for anesthesia services. Some hospitals, in fact, do not have any MDAs, and all anesthesia care is provided by CRNAs. For these reasons, courts have recognized that CRNAs and anesthesiologists can be direct competitors for antitrust purposes. *Oltz* v. *St. Peter's Community Hospital*, 861 F.2d 1440, 1445-48 (9th Cir. 1988); *Bhan* v. *NME Hospitals*, 772 F.2d 1467, 1471 (9th Cir. 1985). Generally, CRNAs provide a lower cost alternative to MDAs. No study has found any significant difference in anesthesia outcome by provider type.

CRNAs function in a variety of practice situations: some are independent contractors who administer anesthesia in hospitals, some work for entities that furnish anesthesia services to hospitals under contract, others are employed by hospitals or in nonhospital environments by clinics, trauma centers and health maintenance organizations, and still others are employed by physician anesthesiologists. CRNAs are certified to administer anesthesia and are legally authorized to do so in every jurisdiction.

Accordingly, AANA has a direct and substantial interest in the decision below which rejects an antitrust attack on Manteca Hospital's exclusion of CRNAs from practicing their profession. The boycott was accomplished by Manteca Hospital's adoption of a policy that only medical doctors of anesthesiology could administer anesthesia in the hospital.

## ARGUMENT

### THIS COURT SHOULD REVIEW THE DECISION BELOW TO RESOLVE THE CONFLICT WITH THE THIRD CIRCUIT CONCERNING THE APPLICATION OF A PER SE APPROACH TO PHYSICIAN BOYCOTTS OF NONPHYSICIAN HEALTH CARE PROVIDERS

#### A. Manteca Hospital's Boycott of CRNAs

Manteca Hospital, a 49-bed facility, is the only acute care hospital in a California central valley town of 37,000 people.[1] Anesthesia services were provided by Associated Anesthesia Services ("AAS") pursuant to a contract with the hospital.[2] AAS assigned Dr. Cull, a physician anesthesia provider, and Mr. Bhan, a CRNA, to the hospital.[3] The hospital and its surgeons became dissatisfied with AAS's performance.[4] The hospital notified AAS that its contract would not be renewed and notified Dr. Cull that his staff privileges would be terminated.[5] Dr. Cull's attorney threatened legal action against the hospital after which the hospital agreed to renew his staff privileges.[6] The hospital also was considering the employment of Dr. Suk, an anesthesiologist.

Without reliance on a tape recording of a key Surgery Committee meeting, the use of which was rejected by the District Court,[7] the reasons for the "MDA-only"

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[1] 929 F.2d at 1407. [Pet. App. at 2.] Parallel citations to the Appendix to the Petition for a Writ of Certiorari are given in brackets.

[2] *Id.* at 1408. [Pet. App. at 3.]

[3] *Id.* [Pet. App. at 4.]

[4] *Id.* [Pet. App. at 4-5.]

[5] *Id.* [Pet. App. at 4.]

[6] *Id.* [Pet. App. at 4.]

[7] 669 F. Supp. 998, 1009 n.4. [Pet. App. at 46 n.4.]

policy are clearly reflected in the deposition testimony of John E. Menaugh, the hospital administrator. The perceived economics of the situation were such that the two MDAs and one CRNA could not be allowed to work at the hospital.[8] If all three were given privileges it would be "a competitive situation,"[9] and under such circumstances the surgeons would not be inclined to use Dr. Cull's services.[10]

The hospital's adoption of the MDA-only policy permitted Dr. Cull and Dr. Suk to divide the available work and completely excluded not only CRNA Bhan, but all CRNAs.[11]

The Court of Appeals framed the issue on appeal in the following terms.

> "The district court found that the plaintiff offered sufficient evidence of a conspiracy to survive summary judgment and that the restraint affected interstate commerce. The parties do not challenge these findings. . . . The only issue raised on appeal, therefore, is whether the practice was an unreasonable restraint of trade." 929 F.2d at 1410.

The AANA submits that the practice *was* an unreasonable restraint of trade. The boycott in this case was exclusively anticompetitive in its purpose and in its effect. Moreover, decades of experience in the courts and before the Federal Trade Commission have shown physician boycotts of nonphysician health care providers to be motivated invariably by anticompetitive objectives and without offsetting justification. The Third Circuit's decision in *Weiss* v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), holding a similar

[8] Menaugh, Vol. II, Tr. 245.

[9] Menaugh, Vol. II, Tr. 295.

[10] Menaugh, Vol. II, Tr. 246.

[11] 669 F. Supp. 998, 1010. [Pet. App. at 48-49.]

restriction to be a per se violation of the Sherman Act, was correct.

### B. CRNAs such as Bhan Are Competitors, for Antitrust Purposes, of Anesthesiologists, such as Dr. Cull and Dr. Suk

CRNAs compete in the market for anesthesia services with MDAs in that a surgeon or other physician may elect to have anesthesia provided either by a CRNA under the surgeons or physicians direction or by an MDA who is licensed to administer anesthesia independently. Because of this role overlap, MDAs and CRNAs can be competitors for antitrust purposes. *Oltz* v. *St. Peter's Community Hospital*, 861 F.2d 1440, 1445-48 (9th Cir. 1988); *Bhan* v. *NME Hospitals*, 772 F.2d 1467, 1471 (9th Cir. 1985). There is no evidence that use of an MDA rather than a CRNA improves patient care.[12]

### C. The Court Below Improperly Rejected a Per Se Approach to the Boycott Based on Hypothetical Pro-Competitive Effects

The court below, while noting that some boycotts are illegal per se, declined to apply a per se approach to Manteca's boycott of CRNAs on the ground that boycotts of a class of health care providers are not "always anti-competitive."[13] Such restrictions, the Court theorized, without any citation to or reference to the record, can help the hospital ". . . provide more efficient, higher

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[12] There is no statistically significant difference in result between CRNA-administered anesthesia and MDA-administered anesthesia. *Health Care For American Veterans*, H. Comm. Print No. 36, 95th Cong., 1st Sess. (1977); Bechtoldt, *Committee on Anesthesia Study-Anesthetic-Related Deaths: 1969-1976*, 42 N.C. Med. J. 253, 257 (1981); Forrest, *Outcome—The Effect of the Provider: Health Care Delivery in Anesthesia* 137 (George F. Stickly Co. 1980).

[13] 929 F.2d at 1412. [Pet. App. at 12-13.]

quality service in order to compete against other hospitals." [14]

This critical assumption became the linchpin of the Ninth Circuit's rejection of a per se analysis, even though the case was decided on motion for summary judgment and the defendants gave no indication that they intended to offer evidence at trial of any such doubtful proposition. Indeed, the court's action denied Bhan the opportunity to refute such a showing. Thus, the court below rejected a per se approach based upon a judicially created presumption of a pro-competitive effect.

### D. The Third Circuit's Use of a Per Se Analysis in *Weiss* v. *York Hospital* Follows Applicable Supreme Court Precedent and Is Inconsistent with the Ninth Circuit's Rejection of the Per Se Approach in This Case

*Weiss* v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), involved discrimination by medical doctors against osteopathic physicians seeking staff privileges at York Hospital. 745 F.2d at 818. The Third Circuit characterized the exclusionary practices as the equivalent of a concerted refusal to deal, or a boycott. 745 F.2d at 818-19. The court concluded that the medical doctors were using their relationship with the hospital to exclude their competitors, the osteopaths. There, as here, there was no evidence that either group provided a superior service. The *Weiss* court held that, since the defendants' conduct constituted a "group boycott" or a "concerted refusal to deal," it was illegal per se. 745 F.2d at 818-20.

In *Weiss*, the Third Circuit noted that the exclusion of *individual* doctors based on lack of professional competence or unprofessional conduct should be viewed as a form of industry self-regulation subject to the rule of reason rather than a per se rule. 745 F.2d at 820.

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[14] *Id.* [Pet. App. at 13.]

Clearly the exclusion of Petitioner Bhan from performing anesthesia services at Manteca Hospital cannot remotely be justified as an individual credentialing decision. The exclusion applied to all CRNAs, not merely Bhan. Moreover, CRNA Bhan's professional competence was not challenged. The physicians and the hospital acted to protect two anesthesiologists from CRNA competition. No attempt was made to justify the action as a decision on Bhan's professional ability. Rather, the court below sought to justify on the basis of speculation that it might enhance the hospital's competitive position.

We submit that, in line with the approach taken by the *Weiss* court, Manteca's MDA only policy should be characterized as a per se violation of the antitrust laws. As stated with respect to clinical psychologists in Note, *The Physician Cartel-Potential Hospital Federal Antitrust Liability in Class-Based Denial of Staff Privileges to Clinical Psychologists*, 39 Drake L. Rev. 509, 520-21 (1989-90):

> "Hospital staff privilege cases can be analogized to a form of industry regulation appropriate for rule of reason balancing. In this context, the rule of reason is used when three criteria are present: (1) a mandate for self-regulation; (2) action consistent with the policy justifying self-regulation and (3) application of procedural safeguards. The presence of JCAH standards on medical staff privileges, state laws that mandate peer review, and the implementation of the Health Care Quality Improvement Act of 1986 provide sufficient self-regulation policy and due process safeguards to bring most physicians' privilege decisions under the rule of reason analysis. Because decisions regarding non-physicians fall outside the sphere of self-regulation, however, the justification for a rule of reason approach is lacking in cases involving class-based denial of staff privileges to clinical psychologists. Giving physicians the benefit of self-regulators' lessened judicial scrutiny under the rule of reason would be illogical

> when their decision making moves outside the sphere of self-regulation. *Physician regulation of another independent health care discipline, which results in a horizontal group boycott, is more appropriately and logically analyzed under the per se rule.*" (Emphasis added. Footnotes omitted.)

A per se approach is in accord with this Court's holding in *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959), that

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. *Cf. United States* v. *Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'"

This Court's decision in *Business Elec. Corp.* v. *Sharp Elec. Corp.*, 485 U.S. 717 (1988), has been interpreted as limiting *Klor's* to ". . . horizontal concerted action at the same level of the distribution hierarchy . . ." Holmes, *Antitrust Law Handbook* 250 (1991 ed.). However, even if so limited, the *Klor's* holding applies to Petitioner Bhan in that Manteca's boycott of CRNAs is both vertical and horizontal. It is horizontal in that the MDAs are shielded from competition from all CRNAs who would otherwise be able to offer anesthesia services to surgeons at Manteca Hospital.

Physician boycotts of nonphysician health care providers, such as CRNAs, should be accorded per se treatment because such boycotts eliminate competition and serve to increase health care costs. As this Court stated in *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 345, 344 (1982),

> "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."

The Court went on to say in a footnote,

> "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Id.* n.15.

As the dissenting opinion of four Justices in *Summit Health Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1851 (1991), pointed out with respect to a boycott of one eye surgeon,

> "[Dr. Pinhas] merely alleges a conspiracy to exclude *him* from that market by a sort of group boycott. *Since group boycotts are per se violations* (not because they necessarily affect competition in the relevant market, but because they deprive at least some consumers of a preferred supplier, see R. Bork, The Antitrust Paradox 331-332 (1978))", Dr. Pinhas need not prove an effect on competition in the Los Angeles area to prevail, if the Sherman Act applies." (Emphasis added.)

Nothing in the majority opinion is inconsistent with the dissent's assumption that a per se rule would apply to the boycott of Dr. Pinhas.

The court below also stated that "the only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition." 929 F.2d at

1414. This conclusion is not true or is it justified. *Weiss* v. *York Hospital, supra*; *Fuentes* v. *South Hill Cardiology*, —— F.2d —— (3rd Cir. Oct. 1, 1991, No. 90-3493, available on Westlaw, 91 WL 192019.

This Court recently held in *Summit Health Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1844 (1991), that the boycott of a single surgeon can constitute an actionable violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, because the essence of the violation is the illegal agreement itself, and the "proper analysis focuses, not upon actual consequences but rather upon the potential harm that would ensue if the conspiracy was successful." In the case below, we submit that the requisite effect on interstate commerce is established by the fact that a class of health care providers, the CRNAs whose nationwide interest AANA represents, are completely excluded from practicing their profession at Manteca Hospital. And, as noted above, the parties did not dispute that the prima facie showing of conspiracy constituted a restraint that "affected interstate commerce." 929 F.2d at 1410.

Granting the Petition would thus permit this Court to clarify the applicability of its decision in *Summit Health* to situations, such as those in the present case, where a class of health care providers is completely excluded from the practice of its profession in the hospital where the anesthesia providers competed. Such anti-competitive practices, even if not subject to per se condemnation, should be condemned under a rule of reason analysis where, as here, both the existence of a conspiracy and an effect on interstate commerce are not at issue.

This Court should grant the Petition to resolve the conflict between the Ninth and Third Circuits concerning the application of the per se rule to condemn boycotts, to which hospitals and physicians are parties, of CRNAs and other nonphysician health care providers.

## CONCLUSION

For the reasons stated above, this Court should grant the Petition for a Writ of Certiorari.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1991

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VINOD C. BHAN, CRNA,

*Petitioner,*

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.
AND JOHN E. MENAUGH,

*Respondents.*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner herewith replies pursuant to Rule 15.6 to Respondents' opposition to the petition for certiorari.

## INTRODUCTION

Despite years of attention by Congress, state governments and the courts, a national concern over escalating health care costs remains.[1] As detailed in the Petition, Congress has repeatedly recognized that hospitals are frequent collaborators in restraints of trade, including restraints affecting non-physicians. Respondents make no attempt to refute the importance of these issues.

While the Circuits are in conflict, the better-reasoned view is that horizontal restraints that limit or eliminate competition from an entire class of professionals are either unreasonable per *se* or facially anticompetitive. The *per se* rule is particularly fitting where the excluded class typically charges less.[2] As there is no affirmative evidence of procompetitive justification in this case, under either standard summary judgment for the defendants was not merited.

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[1] See, e.g., *New York Times*, November 8, 1991, Vol. CXLI, No. 48,778, p. 1, col.6 ("Heeding Elections, Lawmakers Offer Health-Care Ideas").

[2] After Mr. Bhan's exclusion from Manteca Hospital a pricing anomaly was discovered in that the billing service used by both Mr. Bhan and the MDAs billed both CRNA and MDA anesthesia at supra-competitive prices. (Petitioner cited that fact in the courts below as evidence of a Manteca market.) That fact does not change the significance of the lower cost of CRNA anesthesia (see Pet. at 3, n. 2 and accompanying text; *Bhan II*, 929 F.2d 1407, Pet. App. at 2), nor does it speak to what anesthesia charges would have been had Mr. Bhan been allowed to compete with the MDAs at Manteca Hospital. The mere fact that prices dropped temporarily after the anomaly was discovered does not immunize the anti-competitive exclusion from antitrust scrutiny. *Key Enterprises of Delaware, Inc. v. Venice Hosp.* 919 F.2d 1550, 1560 at headnote 3 (11th Cir. 1990).

## REPLY ARGUMENT

### I. THE RATIONALE OF *PINHAS* AND *KLOR'S* APPLIES TO THIS CASE.

This Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) does not have the sweeping implications Respondents seek to read into it. The Court did not overrule *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) in that decision. If the Court had meant to do so, it would have said so, and doubtless it would have cited *Klor's* quite differently this year in *Pinhas*.

*Northwest Wholesale Stationers* itself cites *Klor's* three times. 472 U.S. at 290, 293 and 294. The Court carefully distinguished Pacific Stationery's position from that of the plaintiff in *Klor's* (472 U.S. at 294, column 2), thereby affirming the continuing vitality of *Klor's*.

Both the dissent and the majority opinion in *Pinhas* cite *Klor's* without criticism. *Summit Health, Ltd. v. Pinhas*, 500 U.S. ___, 111 S.Ct. 1842, 1848, 1851 (1991). *Pinhas* indicates the Court's continuing adherence to the *per se* rule of *Klor's*, at least as to certain kinds of boycotts. This principle, disputed by the Respondents (Respondents' Brief at 4-5), has been recognized by the Fourth Circuit. In *Shafi v. St. Francis Hospital*, 1991-2 Trade Cas. (CCH) ¶ 69,500 (4th Cir. July 16, 1991), the Fourth Circuit cited *Pinhas* in vacating a summary judgment entered by the district court because of the plaintiffs "[f]ailure to identify the relevant market..." *Id.* at p. 66,135. *Shafi* thus relied on *Pinhas* in ruling on a substantive question of group boycott illegality. Accordingly, the continuing vitality of the *Klor's* rationale calls for reversal in this case.

## II. *NORTHWEST WHOLESALE STATIONERS* DOES NOT NEGATE THE CONTINUING CONFLICT AMONG THE CIRCUITS.

While Respondents are correct that *Northwest Wholesale Stationers* held that not all concerted refusals to deal are *per se* illegal, it did not hold that none are. Thus, Respondents' conclusion that the *per se* ruling in *Weiss v. York Hospitals*, 745 F.2d 786 (3d Cir. 1984) "has been implicitly overruled by this Court" (Respondents' Brief at 6) is a *non sequitur*.

The continuing validity of *Weiss* has been recognized by cases in the Third Circuit and elsewhere. The appellate courts have read *Northwest Wholesale Stationers* variously, particularly in cases alleging group boycotts of health care professionals.[3] No Circuit,

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[3] As noted below the Third and apparently the Fourth Circuits continue to believe that a group boycott which excludes a class qualifies for *per se* treatment.

The Second and Eighth Circuits believe that the *per se* rule applies when there is concerted action "at some horizontal level" and analyze other concerted refusals to deal under the rule of reason. *Lomar Wholesale Grocery v. Dieter's Gourmet Foods*, 824 F.2d 582, 590, 591 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988), quoted in *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F.Supp. 915, 931 (E.D. Mo. 1990), and in turn quoting *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 132 n. 6 (2d Cir. 1978).

The Fifth Circuit interprets *Northwest Wholesale Stationers* as excluding from the *per se* category boycotts arising from legitimate standard setting practices which counter an inference of anti-competitive purpose. *Goss v. Memorial Hosp. System*, 789 F.2d 353, 355 (5th Cir. 1986) (suspension of obstetrician for questioned competency through peer review process). *Consolidated Metal Prod. v. Amer. Petro. Institute*, 846 F.2d 284, 292 (5th Cir. 1988) (voluntary standard setting by voluntary trade association).

(continued...)

however, has held that *Northwest Wholesale Stationers* overruled *Weiss*, as Respondents contend.

The Third Circuit itself has declined to decide the effect of *Northwest Wholesale Stationers* on *Weiss*. *Miller v. Indiana Hosp.*, 843 F.2d 139, 144 n. 6 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988), *see Fuentes v. South Hills Cardiology*, ___ F.2d ___, 1991-2 Trade Cas. (CCH) ¶ 69,599 (3d Cir. October 1, 1991). After this Court decided *Northwest Wholesale Stationers*, several decisions within the Third Circuit, including one issued this year, have cited *Weiss* as authoritative on the question of the *per se* rule as applied to group boycotts. *Brown v. Our Lady of Lourdes Medical Center*, 767 F.Supp. 618, 628 (D. N.J. 1991); *Northwest Woman's Center v. McMonagle*, 670 F.Supp. 1300, 1303 n. 3 (E.D. Pa. 1987); *Friedman v. Delaware County Hosp.*, 672 F.Supp. 171, 189 (E.D. Pa. 1987).

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[3](...continued)

Similarly, authority from the Sixth Circuit suggests that boycotts of health care professionals should generally be treated under the rule of reason when they are ancillary to pro-competitive cooperation among competitors; *Hassan v. Independent Practice Associates, P.C.*, 698 F.Supp. 679 (E.D. Mich. 1988) (upholding exclusion of competing doctors who refuse to subscribe to cost containment rules which enabled the defendant independent practice association to compete for health maintenance organization business). *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir.) *cert. denied* 499 U.S. 1033 (1986).

The Seventh Circuit in *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1155 (7th Cir. 1984) (*en banc*), *rev'd on other grounds*, 470 U.S. 373 (1985)) opined that boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se*. However, the two *Wilk* decisions discussed in the Petition expressly applied the Rule of Reason to a health care boycott solely for quality of care "ethical" reasons.

Other circuits, while distinguishing or disagreeing with *Weiss*, recognize its continuing validity. In *Oksanen v. Page Memorial Hospital* __ F.2d __, 1991-2 Trade Cas. (CCH) ¶ 69,562 at p. 66,489 (4th Cir. September 4, 1991) the Fourth Circuit distinguished *Oksanen* from *Weiss* as follows: "[t]his case is not one in which a representative of a *class of competitors* is being excluded from the market. *Cf.* ... *Weiss* (attempt to exclude osteopath)." (Emphasis added.) *See also, Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F.Supp. 1186, 1193 (W.D. N.C. 1988); *Collins v. Associated Pathologists, Ltd.*, 676 F.Supp. 1388, 1399, (C.D. Ill. 1987), *aff'd*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988).

Indeed, *Weiss* was cited by Justice Scalia in his dissent in *Pinhas* on the identification of the "infected activities" for interstate commerce purposes. 500 U.S. at __, 111 S.Ct. at 1850, 114 L.Ed.2d at 379. Moreover, the dissent nowhere suggests that *Weiss* was wrong, and notes without qualification that "group boycotts are *per se* violations ... because they deprive at least some consumers of a preferred provider .... ." *Ibid.* (citation omitted).

## III. THE RESTRAINT SHOWN IN THIS CASE IS UNREASONABLE UNDER THE ANALYSIS THIS COURT DESCRIBED IN *INDIANA FEDERATION OF DENTISTS*

### A. The Restraint Is Facially Anticompetitive.

Respondents note that this Court's ruling in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), as involved "an agreement 'to withhold from their

customers a particular service that they desire'[4] and evidence of ... anticompetitive effects resulting from that agreement' (Respondents' Brief at 7, quoting 476 U.S. at 459). As both lower courts observed, Mr. Bhan presented sufficient conspiracy evidence to avoid summary judgment on that ground. *Bhan v. NME Hospitals*, 669 F.Supp. 998, 1017 (E.D.Cal. 1987), Pet. App. at 63-64; *aff'd*, 929 F.2d 1404, 1410 (9th Cir. 1991), Pet. App. at 8. Petitioner submits that the permanent exclusion of a lower-priced class of competitors, even from a single hospital, is a sufficient showing of anticompetitive effects under *Indiana Federation of Dentists*. All CRNAs are permanently barred from competing for the services previously provided by Mr. Bhan and his MDA competitors.

### B. The Restraint Arose From Anticompetitive Motives

Moreover, to the extent that *Indiana Federation of Dentists* relied on evidence of anticompetitive purpose, such evidence is abundant in this case -- certainly enough to create a triable issue of fact. Respondents, who include hospital administrator Menaugh, make no attempt to refute the evidence Petitioner cited that the

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[4] Actually, the Indiana dentists were withholding x-rays from their customers' *insurers*, and the Court's opinion does not address whether dental *patients* cared about the restraint. Similarly in this case, the restraint serves to prevent the surgeons, who typically take responsibility for arranging for anesthesia services, from choosing CRNA care, whether for potential cost savings which primarily benefit patients' insurers, or to obtain the services of a particular desired provider such as Mr. Bhan.

conspirators' motives were anticompetitive.[5] Such evidence of anticompetitive animus requires reversal of the summary judgment entered by the district court. *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 243 (1980) (Section 1 violation may be shown by "*either* an unlawful purpose or an anticompetitive effect" (citations omitted; emphasis in original)); *see Chicago Board of Trade v. United States*, 246 U.S. 231, 239 (1918) ("Knowledge of intent may help the court to interpret facts and to predict consequences").

### C. The Record Supports No Justification.

At best, the Ninth Circuit's rationale suggests that by eliminating CRNAs Manteca Hospital *may* make its surgeons happier, leading in the long run to more patients being admitted to its facility for surgery, and hence more income to the hospital as well as the independent professionals in the surgical suite. This is an increase it income, not competition. As illustrated recently in *Chicago Pro Sports*, 754 F.Supp. 1336, 1362-1364 (N.D. Ill. 1991), such purported justifications "must be rejected on principle. ... 'We do it because it's more profitable' is not a defense under the Sherman Act." 754 F.Supp. at 1359. Like the reduction of "output" from 25 to 20 basketball games to be televised on "superstations" in *Chicago Pro Sports*, restricting anesthesia input by excluding one of the two classes of providers to enhance MDA incomes is facially anticompetitive.

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[5] Respondents concede that a motive for the exclusion of CRNAs including Mr. Bhan was "the realization that the hospital could not support more than two anesthesia providers." Respondents' Brief at 2. "Support" here refers to the number of cases: the hospital did not pay, or handle billing for, its anesthesia providers.

Where the restraint is accomplished by ruling out an entire class of competitor -- as if the NBA had sought to ban superstation telecasts altogether -- the result is a "'naked restraint of trade with no purpose except stifling of competition... .'" *Broadcast Music Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-20 (1979), quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Further, unlike the basketball broadcast restraint, there is no contention in this case that the exclusion of CRNAs was "ancillary" to a lawful business arrangement. *Cf., Chicago Pro Sports*, 754 F.Supp. at 1357-1358. While defendants' motives may present triable issues if a "patient care defense" is available, that the naked restraint shown in this case may profit its participants is no reason to require detailed proof of market power. Class-based exclusions of lower-priced health care professionals, if not held unlawful *per se*, are nonetheless unreasonable restraints of trade.

### D. The Effects Are Anticompetitive.

Respondents concede that the economics of a single hospital's anesthesia business motivated the decision to exclude CRNAs.[6] The impact on that hospital's anesthesia business is facially anticompetitive.

As the Ninth Circuit's opinion notes, *Indiana Federation of Dentists* accepted as sufficient a finding that the dentists' conspiracy had succeeded in thwarting insurers' demands for x-rays in "at least two localities." 929 F.2d at 1413 n. 10. Despite the absence of any proof that those towns were relevant markets, this Court accepted that evidence as a sufficient showing of anticompetitive effects. The elimination of all CRNAs

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[6] See note 5, *supra*.

from the only acute care hospital in Manteca deserves similar treatment.

## CONCLUSION

As in *Pinhas*, the denial of hospital access in this case implicates competition irrespective of the competition among hospitals for patients. Unlike *Pinhas*, this case presents a *class-based* exclusion which merits per se condemnation.

This case provides a valuable opportunity to instruct the lower courts that they must first focus on evidence of anticompetitive purpose and effect, and address market definition and potential justifications only where evidence of purpose or effect is counterbalanced by a demonstrable benefit to competition.

For the above reasons and those set forth in the Petition, the writ should issue and the judgment of the court of appeals be reversed.

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